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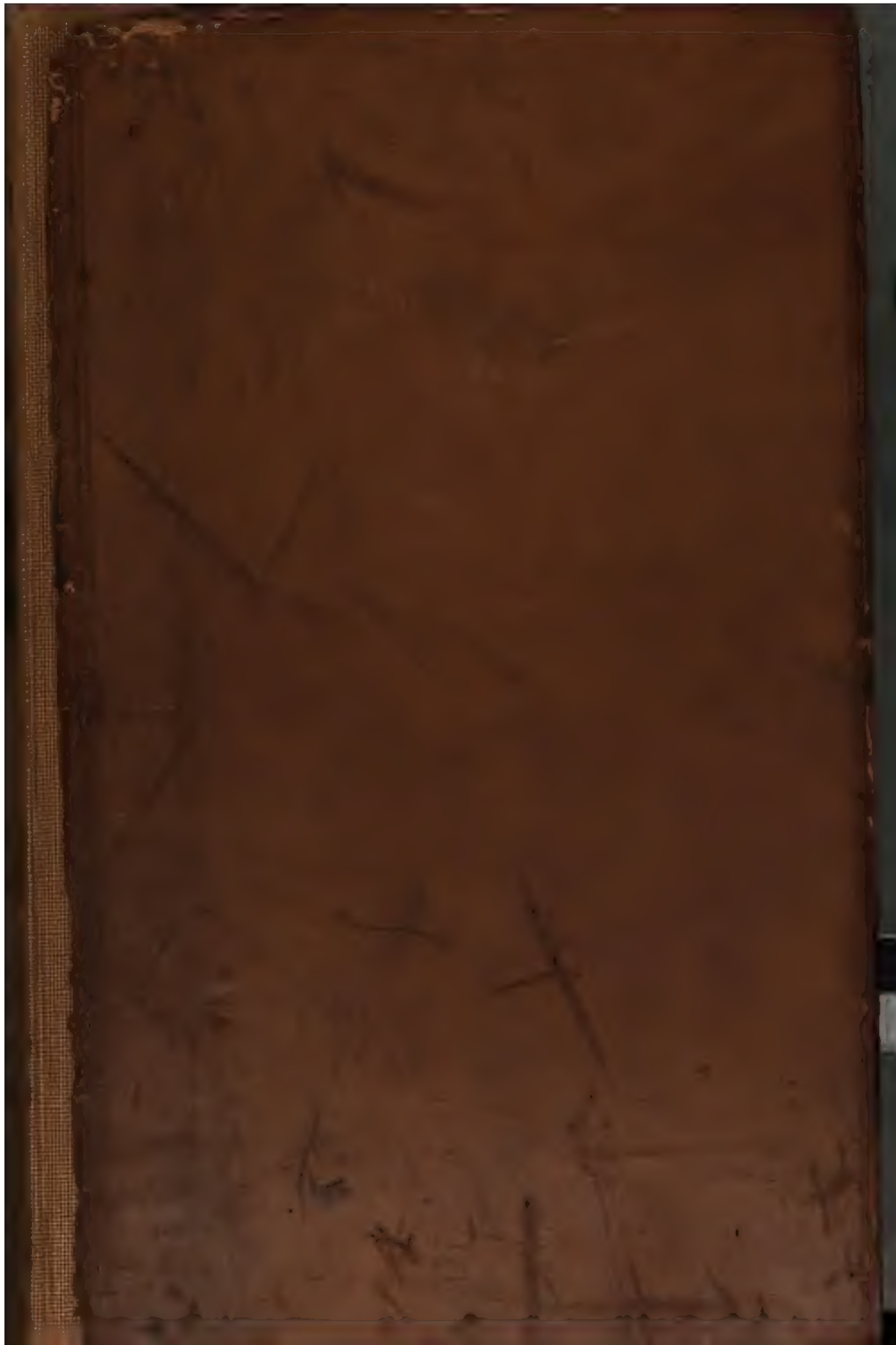
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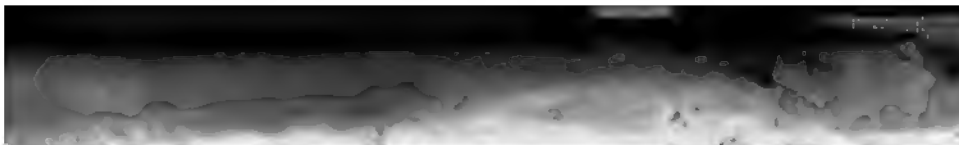
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

TRINITY TERM, 1 VICT.

TO

HILARY TERM, 2 VICT., BOTH INCLUSIVE.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



BY

R. MEESON, Esq., AND W. N. WELSBY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTERS AT LAW.



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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.



The Right Honorable JAMES, Baron ABINGER,
Lord Chief Baron.

BARONS.

Sir JAMES PARKE, Knt.
Sir WILLIAM BOLLAND, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.



ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

ERRATA.

- Page 51, line 16, *for* replication, *read* representation.
284, *subjoin* [5 Bing. 130] as note (a), to line 7.
line 19, and the note, *for* (a) *insert* (b).
503, note (b), *for* 314, *insert* 317.
507, note (d), *for* Ad., *insert* Ald.
527, line 23, *for* defendant, *read* plaintiff.
769, lines 6 & 3 from bottom, marginal note, *for*
Reddings, *read* Ruddocks.

A

TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

ABERDEIN, STEWART v.	- 211	Cates, Edmunds v.	- - 66
Ahrenfeldt, Brown v.	- - 76	Cattell, Corral v.	- - 734
Alderman v. Neate	- - 704	Chambers, Hallifax v.	- - 661
Allen v. Pink	- - 140	Chanter v. Hopkins	- - 399
Anderson v. Fuller	- - 470	———— v. Leese	- - 295
Armitage, Tripp v.	- - 687	Clarkson v. Parker	- - 532
Ashwin, Savage v.	- - 530	Clement, Wainwright v.	- - 385
Attor.-General v. Bouwens	- 171	Colchester v. Roberts	- - 769
———— v. Sewell	- 77	Colerick, Patrick v.	- - 527
Ayrey v. Fearnside	- - 168	Collis, Dowler v.	- - 531
Badnall v. Haylay	- - 535	Compton v. Taylor	- - 138
Baggaley, Sinclair v.	- - 312	Cownell, Thomas v.	- - 265
Baker, Calvert v.	- - 417	Cooke v. Vaughan	- - 69
———— Mogg v.	- - 348	Cooper, Jackson v.	- - 353
Barker v. Greenwood	- 421	———— v. Whitmarsh	- - 73
Bennett, King v.	- - 36	Coppock v. Bower	- - 361
Blow v. Wyatt	- - 407	Corner v. Shew	- - 163
Bousfield, Buzzard v.	- 368	Corral v. Cattell	- - 734
Bouwens, Attor.-General v.	171	Cowling v. Higginson	- - 245
Bower, Coppock v.	- - 361	Cowper v. Smith	- - 519
Boydell v. Jones	- - 446	Cox, Wickens v.	- - 67
Brown v. Ahrenfeldt	- - 76	Crafts, Freeman v.	- - 4
Bryans v. Nix	- - 775	Crisp, Laybourn v.	- - 320
Burghart v. Hall	- - 727	Crowther v. Elwell	- - 71
Buzzard v. Bousfield	- - 368	Cursham v. Newland	- - 101
Calvert v. Baker	- - 417	Daly, Richardson v.	- - 387
Camden v. Fletcher	- - 378	Davies v. Griffiths	- - 377
Carroll, Watson v.	- - 592	———— Doe d. Amlot v.	- - 599
		Davis, Noel v.	- - 136

TABLE OF THE CASES.

<i>is, Ramsbottom v.</i>	- 584	<i>Hall, Burghart v.</i>	- 727
— <i>v. Lovell</i>	- 678	—— <i>Youlton v.</i>	- 582
<i>rison, Lewis, v.</i>	- 654	<i>Hallifax v. Chambers</i>	- 661
<i>ngate v. Gardiner</i>	- 5	<i>Hamilton, Hemingway v.</i>	- 115
<i>wdney v. Palmer</i>	- 664	<i>Hansby v. Evans</i>	- 565
<i>ckenson, Harrison v.</i>	- 355	<i>Harrison v. Dickenson</i>	- 355
<i>ie d. Amlot v. Davies</i>	- 599	—— <i>v. Timmins</i>	- 510
—— <i>Cousins v. Roe</i>	- 68	—— <i>Duckworth v.</i>	- 432
—— <i>Davies v. Morgan</i>	- 171	—— <i>Wallis v.</i>	- 538
—— <i>Holder v. Rushworth</i>	74	<i>Hawkings v. Newman</i>	- 613
—— <i>Littlewood v. Green</i>	229	<i>Hawkins, Hall v.</i>	- 590
—— <i>Harvey, Francis v.</i>	- 331	<i>Haylay, Badnall v.</i>	- 535
<i>Dowler v. Collis</i>	- 531	<i>Hayman, Price v.</i>	- 8
<i>Duckworth v. Harrison</i>	- 432	<i>Hayward v. Giffard</i>	- 194
<i>Dudden v. Triquet</i>	- 676	<i>Hemingway v. Hamilton</i>	- 115
<i>Dykes, Monks v.</i>	- 567	<i>Henderson, Holland v.</i>	- 587
<i>East v. Pell</i>	- 665	<i>Hetherington v. Robinson</i>	- 608
<i>Edmunds v. Cates</i>	- 66	<i>Higginson, Cowling v.</i>	- 245
<i>Elwell, Crowther v.</i>	- 71	<i>Hill, Inman v.</i>	- 7
<i>Evans, Hansby v.</i>	- 565	<i>Hislop, White v.</i>	- 73
<i>Fearnsides, Ayrey v.</i>	- 168	<i>Hitchman v. Walton</i>	- 409
<i>Fletcher, Camden v.</i>	- 378	<i>Hodsoll v. Wise</i>	- 536
<i>Ford, Lewis v.</i>	- 361	<i>Hodson v. Pennell</i>	- 373
<i>Foss v. Racine</i>	- 419, 610	<i>Holland, Henderson v.</i>	- 587
<i>Francis v. Doe d. Harvey</i>	- 331	<i>Hopkins, Chanter v.</i>	- 399
<i>Freeman v. Crafts</i>	- 4	—— <i>v. Mayor of Swan-</i>	
<i>Fuller, Anderson v.</i>	- 470	<i>sea</i>	- 621
<i>Gardiner, Dengate v.</i>	- 5	<i>Howells, Goode v.</i>	- 199
—— <i>Onley v.</i>	- 496	<i>Hughes v. Rees</i>	- 204, 468
<i>Giffard, Haward v.</i>	- 194	<i>Inman v. Hill</i>	- 7
<i>Glatton Land Tax, in re</i>	- 570	<i>Isaac v. Rickardo</i>	- 383
<i>Goode v. Howells</i>	- 199	<i>Jackson v. Cooper</i>	- 35
<i>Gosden, Ramsbottom v.</i>	- 584	<i>Jolliffe v. Mundy</i>	- 50
<i>Graham, Straker v.</i>	- 721	<i>Jones, Boydell v.</i>	- 44
<i>Grandine, Learmonth v.</i>	- 658	—— <i>v. Ryder</i>	- 1
<i>Grand Junction Railway</i>		—— <i>v. Senior</i>	- 1
<i>Company, Palmer v.</i>	- 749	—— <i>Thomas v.</i>	- 1
<i>Green, Doe d. Littlewood v.</i>	229	—— <i>v. Williams</i>	- 1
<i>Greenwood, Barker v.</i>	- 421	<i>Jopling, M'Donald v.</i>	- 1
<i>Griffiths, Davies v.</i>	- 377	<i>Jordan v. Norton</i>	- 1
<i>Hall v. Rouse</i>	- 24	<i>Kennedy, Rust v.</i>	- 1
—— <i>v. Hawkins</i>	- 590	<i>King v. Bennett</i>	- 1
		<i>Kirkman v. Siboni</i>	- 1

TABLE OF THE CASES.

vii

Lancaster <i>v.</i> Walsh - - -	16	Peterson, Rogers <i>v.</i> - - -	588
—— Canal Co., Thick-		Pink, Allen <i>v.</i> - - -	140
ness <i>v.</i> - - -	472	Pike, May <i>v.</i> - - -	197
Langridge, Levy <i>v.</i> - - -	337	Pocock, Reynolds <i>v.</i> - - -	371
Larchin <i>v.</i> Willan - - -	351	Pope <i>v.</i> Wray - - -	451
Laybourn <i>v.</i> Crisp - - -	320	Price <i>v.</i> Hayman - - -	8
Leaf <i>v.</i> Lees - - -	579	Promotions - - -	545, 800
Learmonth <i>v.</i> Grandine - - -	658		
Lees, Leaf <i>v.</i> - - -	579	Racine, Foss <i>v.</i> - - -	419, 610
Leese, Chanter <i>v.</i> - - -	295	Radford <i>v.</i> Smith - - -	100
Levy <i>v.</i> Langridge - - -	337	Ramsbottom <i>v.</i> Davis - - -	584
Lewis <i>v.</i> Davison - - -	654	—— <i>v.</i> Gosden - - -	<i>ib.</i>
—— <i>v.</i> Ford - - -	361	Randall <i>v.</i> Rigby - - -	130
Lovell, Davies <i>v.</i> - - -	678	Rees, Hughes <i>v.</i> - - -	204, 468
		Regina <i>v.</i> Sheriff of Middle-	
M'Donald <i>v.</i> Jopling - - -	284	sex - - -	529
Matthews, Sainsbury <i>v.</i> - - -	342	Regulæ Generales, 1, 342, 546	
May <i>v.</i> Pike - - -	197	Reynolds <i>v.</i> Pocock - - -	371
Memoranda - - -	545, 800	Rhodes <i>v.</i> Smethurst - - -	42
Milton, Nyas <i>v.</i> - - -	359	Richardson <i>v.</i> Daly - - -	384
Mogg <i>v.</i> Baker - - -	348	Rickardo, Isaac <i>v.</i> - - -	383
Monks <i>v.</i> Dykes - - -	567	Rigby, Randall <i>v.</i> - - -	130
Morgan, Doe <i>d.</i> Davies <i>v.</i> - - -	171	Roberts, Colchester <i>v.</i> - - -	769
——, Scarfe <i>v.</i> - - -	268	Robinson, Hetherington <i>v.</i> - - -	608
Mostyn, Williams <i>v.</i> - - -	145	Roe, Doe <i>d.</i> Cousins <i>v.</i> - - -	68
Mundy, Jolliffe <i>v.</i> - - -	502	Rogers <i>v.</i> Peterson - - -	588
		——, Stuart <i>v.</i> - - -	649
Neate, Alderman <i>v.</i> - - -	704	Rouse, Hall <i>v.</i> - - -	24
Nelson <i>v.</i> Serle - - -	795	Rushworth, Doe <i>d.</i> Holder <i>v.</i> - - -	74
Newland, Cursham <i>v.</i> - - -	101	Rust <i>v.</i> Kennedy - - -	586
Newman, Hawkings <i>v.</i> - - -	613	Ryder, Jones <i>v.</i> - - -	32
Nix, Bryans <i>v.</i> - - -	775		
Noel <i>v.</i> Davies - - -	136	Sainsbury <i>v.</i> Matthews - - -	342
Norton, Jordan <i>v.</i> - - -	155	Savage <i>v.</i> Ashwin - - -	530
Nyas <i>v.</i> Milton - - -	359	Scarfe <i>v.</i> Morgan - - -	268
		Scott, in re - - -	257
Oliver <i>v.</i> Woodroffe - - -	650	Senior, Jones <i>v.</i> - - -	123
Onley <i>v.</i> Gardiner - - -	496	Serle <i>v.</i> Waterworth - - -	9
		——, Nelson <i>v.</i> - - -	795
Palmer, Dewdney <i>v.</i> - - -	664	Sewell, Attorney-General <i>v.</i> - - -	77
—— <i>v.</i> Grand Junction		Shew, Corner <i>v.</i> - - -	163
Railway Company - - -	749	Siboni, Kirkman <i>v.</i> - - -	339
Parker, Clarkson <i>v.</i> - - -	532	Sinclair <i>v.</i> Baggaley - - -	312
Patrick <i>v.</i> Colerick - - -	527	Smethurst, Rhodes <i>v.</i> - - -	42
Pell, East <i>v.</i> - - -	665	Smith, Radford <i>v.</i> - - -	100
Pennell, Hodson <i>v.</i> - - -	373	—— <i>v.</i> Winter - - -	454

Smith, Cowper <i>v.</i>	-	-	519	Walsh, Lancaster <i>v.</i>	-	-	16
——, Wood <i>v.</i>	-	-	522	Walton, Hitchman <i>v.</i>	-	-	409
Straker <i>v.</i> Graham	-	-	721	Waterworth, Serle <i>v.</i>	-	-	9
Stuart <i>v.</i> Rogers	-	-	649	Watson <i>v.</i> Carroll	-	-	592
Swansea, Mayor of, Hop-				White <i>v.</i> Hislop	-	-	73
kins <i>v.</i>	-	-	621	Whitmarsh, Cooper <i>v.</i>	-	-	73
Taylor, Compton <i>v.</i>	-	-	138	Wickens <i>v.</i> Cox	-	-	67
Thicknesse <i>v.</i> Lancaster				Willan, Larchin <i>v.</i>	-	-	351
Canal Company	-	-	472	Williams, Jones <i>v.</i>	-	-	375
Thomas <i>v.</i> Connell	-	-	265	——— <i>v.</i> Mostyn	-	-	145
——— <i>v.</i> Jones	-	-	28	Winter, Smith <i>v.</i>	-	-	454
Timmins, Harrison <i>v.</i>	-	-	510	Wise, Hodsoll <i>v.</i>	-	-	536
Tripp <i>v.</i> Armitage	-	-	687	Wood <i>v.</i> Smith	-	-	522
Vaughan, Cooke <i>v.</i>	-	-	69	Woodroffe, Oliver <i>v.</i>	-	-	650
Wainwright <i>v.</i> Clement	-	-	385	Wray, Pope <i>v.</i>	-	-	451
Wallis <i>v.</i> Harrison	-	-	538	Wyatt, Blow <i>v.</i>	-	-	407
				Youlton <i>v.</i> Hall	-	-	582

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

TRINITY TERM, 1 VICTORIÆ.

—◆—
REGULÆ GENERALES.

—◆—
ACTIONS ON BILLS AND NOTES.

Trinity Term, 1 Vict. 1838.

IT IS ORDERED, that in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

*Exch. of Pleas,
1838.*

(Signed by all the Judges.)

—◆—
PLEADING RULES, &c.

Trinity Term, 1 Vict.

WHEREAS it is expedient that certain rules and regulations made in Hilary Term, in the fourth year of his late

Exch. of Pleas,
1838.

Majesty King William the Fourth, pursuant to the statutes of 3 & 4 Will. 4, c. 42, s. 1, should be amended, and some further rules and regulations made pursuant to the same statute :

IT IS THEREFORE ORDERED, that from and after the first day of Michaelmas Term next inclusive, unless Parliament shall in the mean time otherwise enact, the following Rules and Regulations, made pursuant to the said statute, shall be in force:—

FIRST, IT IS ORDERED, that the 17th and 19th of the General Rules and Regulations made pursuant to the statute 3 & 4 Will. 4, c. 42, s. 1, be repealed, and that in the place thereof the two following amended Rules be substituted, viz.:—

FOR THE 17TH RULE.

Payment of Money into Court.—When money is paid into Court, such payment shall be pleaded in all cases, and as near as may be in the following form, mutatis mutandis:—

Form of Plea.

C. D. } The day of .
ats. } The defendant, by , his attorney,
A. B. } (or, in person, &c.,) says (*or, in case it be*
pleaded as to part only, add, “ as to £ , being part
of the sum in the declaration,” or “ count mentioned,”
or “ as to the residue of the sum of £ ,”) that the
plaintiff ought not further to maintain his action, because
the defendant now brings into Court the sum of £ ,
ready to be paid to the plaintiff; and the defendant fur-
ther says, that the plaintiff has not sustained damages, (*or,*
in actions of debt, “ that he never was indebted to the
plaintiff”) to a greater amount than the said sum of &c.,
in respect of the cause of action in the declaration men-
tioned, (*or, “ in the introductory part of this plea men-*

tioned,") and this he is ready to verify : wherefore he prays judgment if the plaintiff ought further to maintain his action thereof. *Exch. of Pleas,*
1838.

FOR THE 19TH RULE.

Proceedings by Plaintiff after Payment of Money into Court.—The plaintiff, after delivery of a plea of payment of money into Court, shall be at liberty to reply to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in ; and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs so taxed ; or the plaintiff may reply " that he has sustained damages, (or " that the defendant was and is indebted to him," *as the case may be,*) to a greater amount than the said sum ;" and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

General Issue by Statute.—It is further ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of any act of Parliament, he shall insert in the margin of the plea the words " by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament : and such memorandum shall be inserted in the margin of the issue, and of the Nisi Prius record.

Payments credited in Particulars of Demand need not be Pleaded.—In any case in which the plaintiff (in order to avoid the expence of the plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

Rule not to apply to Claim of Balance.—But this rule

Exch. of Pleas,
1838.

is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Payment in Reduction of Damages or Debt not to be allowed.—Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

(Signed by all the Judges.)

FREEMAN v. CRAFTS.

In debt for work and labour, &c., the aggregate of the sums stated in the declaration being 30*l.*, the defendant pleaded payment of divers sums of money, amounting in the whole to the amount of all the debts and monies in the declaration mentioned. The defendant proved payments to the amount of 92*l.*, but the plaintiff proved work done, &c. to the amount of 107*l.*:—*Held*, that the plaintiff was entitled to a verdict for the balance, and was not bound to new assign.

DEBT in 10*l.* for goods sold and delivered, in 10*l.* for work and labour and materials, and in 10*l.* on an account stated. Pleas, first, *nunquam indebitatus*; secondly, that the defendant paid to the plaintiff divers sums of money, amounting in the whole to a large sum of money, to wit, the amount of all the several alleged debts and monies in the declaration mentioned, in full satisfaction and discharge of the said several debts and monies, &c.; on which issue was taken. On the trial before the under-sheriff of Middlesex, the defendant proved payments to the plaintiff of sums exceeding the amount claimed in the declaration, and the jury found that 92*l.* had been paid by the defendant to the plaintiff, but that the plaintiff had done work for the defendant to the amount of 107*l.* A verdict was thereupon taken for the plaintiff for the balance of 15*l.*, leave being reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion that the plaintiff was not entitled to recover without a new assignment.

Corrie now moved accordingly.—The plea was supported by proof of any sum paid, to the amount claimed

in the declaration, and if the action was brought for other sums than those so paid, the plaintiff ought to have new assigned: otherwise how is the defendant to get the costs of the plea of payment? It is to be assumed that the defendant has answered what the plaintiff charges against him. In *Collins v. Aron* (a), it seems to be implied in the judgment of *Tindal*, C. J., that the proper course to have pursued in such a case as this, would have been to apply to increase the damages laid in the declaration, or else to new assign. The declaration here is quite general.

Exch. of Pleas,
1838.

FREEMAN
v.
CRAFTS.

LORD ABINGER, C. B.—So is the plea; it means that the defendant has paid the sums the plaintiff goes for, or it means nothing. To make the plea a good defence, it must be interpreted to apply to a payment of the money the plaintiff seeks to recover; it is no answer, unless it means that the plaintiff can prove no sum which the defendant has not paid.

ALDERSON, B.—It is like the plea of licence in trespass, where the defendant must prove a licence for every trespass the plaintiff can prove. So, in a plea of payment, you undertake to prove that whatever demand the plaintiff can establish, you have paid him. No new assignment was therefore necessary.

PER CURIAM,

Rule refused.

(a) 4 Bing. N. C. 233.

DENGATE and Wife v. GARDINER.

CASE for slanderous words (which were actionable in themselves) spoken of the female plaintiff. The declaration was for slanderous words, actionable in themselves, spoken of the wife, they cannot recover for special damage by the loss of service by the wife.

In case by husband and wife for slanderous words, actionable

by the loss of service by the wife.

Exch. of Pleas,
1838.

DENGATE
v.
GARDINER.

tion stated as special damage, that by reason of the speaking of the words, certain persons named refused to employ her as a servant. Plea, not guilty. At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after last term, the plaintiffs tendered evidence of the special damage, but the learned judge held that it was not admissible, this being a joint action by the husband and wife: and the plaintiff had a verdict for 20s. only.

Mansel now moved for a new trial, on the ground of the rejection of this evidence.—The words being actionable per se, the plaintiffs, by the stat. 21 Jac. c. 16, s. 6, can obtain no more costs than damages, the verdict being under 40s.; but if the evidence of special damage was admissible, the verdict would certainly have exceeded that sum. If it was properly rejected, then it follows that the husband and wife must join in an action for the words, but the husband must bring a second action in his own name for the special damage. There is no case precisely in point, but it is laid down in *Weller v. Baker* (a), that the wife may join in the action whenever any right or interest of hers is in question, which has been disturbed or injured by the defendant: see also Com. Dig. Baron & Feme, X. Here the wife was the meritorious cause of action for the special damage—she had a certain interest in her being employed as a servant. It is not like the case of customers refusing to deal with a wife who is carrying on a trade; there the trade is her husband's; but here the wife is the sole meritorious cause of action, the whole benefit arising from her labour.

LORD ABINGER, C. B.—I am not surprised that no case can be found to shew that special damage can be recovered in an action by husband and wife for slander of the

(a) 2 Wils. 414, 423.

wife. She must join because she is the party slandered, and the husband must join for conformity; but as the profit of her wages is entirely his, he alone can sue for the loss of them; just as, in trespass by husband and wife for assault on the wife, the surgeon's bill cannot be recovered. The right of action would not survive to her. The point is quite clear.

Exch. of Pleas,
1838.

DENGATE
v.
GARDINER.

GURNEY, B.—It is perfectly clear that whatever was the nature of the wife's service, the result of it would accrue to the husband.

Rule refused.

INMAN v. HILL and Others.

THIS cause stood for trial at the last Chester Assizes, but was postponed on the ground of the absence of a material witness, on payment of the costs of the day. The order of *Nisi Prius*, which was made a rule of Court, directed that the defendants should pay those costs "to the plaintiff."

Where a trial was postponed by reason of the absence of a material witness, on payment of the costs of the day by the defendants "to the plaintiff:"—
Held, that a demand of such costs by the plaintiff's attorney in the cause, was sufficient whereon to ground an attachment for their non-payment.

Welsby had obtained a rule for an attachment against the defendants for non-payment of the costs pursuant to the Master's allocatur, but the Master had requested that the matter might be mentioned to the Court, doubting whether the demand, which had been made by the plaintiff's attorney in the cause, was sufficient.—He submitted, that as these were costs which the attorney had necessarily incurred in the conduct of the cause, and which he was entitled to receive as attorney in the cause, the demand by him was sufficient, without a power of attorney, notwithstanding the terms of the rule of Court. He referred to *Cox v. Salmon*. (a)

Lord ABINGER, C. B.—I think the demand was sufficient, these being costs which the attorney employed in

(a) 1 M. & W. 127.

Exch. of Pleas, 1838. the cause was entitled to receive, and which he must probably have paid out of his own pocket.

INMAN
v.
HILL.

PER CURIAM,

Rule absolute.

PRICE v. HAYMAN.

Where a rule is enlarged from one term to another, and the rule states that affidavits to be used on shewing cause are to be filed by a certain day before the term; if affidavits are filed accordingly, and the other party takes office copies of them, the latter has a right to use them, although the party filing them may not be desirous of doing so.

IN this case a rule had been obtained, calling on the plaintiff or his attorney to refund a sum of 9*l.* 11*s.* 6*d.*, received from the defendant on the execution of a bail-bond. The rule had been enlarged from Easter Term, all affidavits to be used on shewing cause to be filed a week before the term. Certain affidavits had been accordingly filed by the plaintiff, of which the defendant had taken office copies.

R. V. Richards now appeared to shew cause, and stated that there were some of the affidavits so filed which he proposed not to use, if the Court should be of opinion that in that case the other side would have no right to refer to them.

PARKE, B.—It seems to me that the time for the party to choose whether he will use the affidavits or not, is when he files them, and if he thinks fit to file them, and the other party takes office copies of them, the latter has a right to use them.

The Court however sent to consult the officers of the Court of Queen's Bench; and subsequently,

PARKE, B., said—The officers of the Queen's Bench certify to us, that as soon as the affidavits are filed, either party may use them.

Richards accordingly referred to the affidavits, and ultimately the rule was

Discharged.

Exch. of Pleas,
1838.

SERLE v. WATERWORTH.

DEBT on a promissory note for 24*l.* 1*s.* 4*d.*, value received, dated the 3d of January, 1837, made by the defendant, payable twelve months after date to the plaintiff. There was also a count on an account stated. The defendant ~~pleaded~~ to the first count, that one Joseph Waterworth, before and at the time of his death, to wit, on the 2d of January, 1837, was indebted to the plaintiff in a certain sum of money, to wit, the sum of 24*l.* 1*s.* 4*d.* for the price and value of goods by the plaintiff before then sold and delivered to the said Joseph Waterworth, which sum was due and owing to the plaintiff at the time of the making of the promissory note in the first count mentioned; and that the plaintiff, after the death of the said Joseph Waterworth, and before the making of the said note, to wit, on the 2d of January, 1837, applied to the defendant for payment thereof; whereupon, in compliance with the said request, the defendant, after the death of the said Joseph Waterworth, for and in respect of the said debt so then remaining due to the plaintiff as aforesaid, and for no other consideration whatsoever, then made and delivered the said note to the plaintiff: and the defendant further says, that the said Joseph Waterworth

To a declaration in debt on a promissory note for 24*l.*, dated 3d January, 1837, made by the defendant, payable twelve months after date to the plaintiff, the defendant pleaded that one J. W., before and at his death, was indebted to the plaintiff in 24*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, after the death of J. W., applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after

the death of J. W., for and in respect of the debt so remaining due to the plaintiff as aforesaid, and for no other consideration whatever, made and delivered the note to the plaintiff; and that J. W. died intestate, and that, at the time of the making and delivery of the note, no administration had been granted of his effects, nor was there any executor or executors of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid. Replication, *de injuriâ*:—*Held*, after verdict for the defendant, that the plea was no answer to the declaration, inasmuch as it did not negative every consideration for the promissory note, for that it did not allege that there were no assets; and the effect of the giving of the note was, at all events, to preclude the plaintiff from suing the defendant, in case she should afterwards take out administration, for a year, which was a sufficient consideration for the giving of the note: and therefore that the plaintiff was entitled to judgment *non obstante veredicto*.

The widow of a hair-dresser, who died in October 1836, continued to reside in his house and keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold. In December, she received notice of a bond debt of 100*l.* due from him, and had his goods valued. In January 1837, on the application of a creditor to whom he owed 24*l.* for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date. In March, she took out administration:—*Held*, in an action against her on the promissory note, that this was not evidence to charge her as executrix *de son tort*.

Exch. of Pleas,
1838.

SERLE
v.
WATERWORTH.

died intestate, to wit, the same day and year aforesaid, and that at the time of the making and delivery of the said note to the plaintiff as aforesaid, no administration had been granted of the estate and effects of the said Joseph Waterworth, nor was there at that time any executor or executrix of the estate and effects of the said Joseph Waterworth, nor was there at that time any person liable for the said debt so remaining due to the plaintiff as aforesaid. Verification. To the last count the defendant pleaded *nunquam indebitatus*. Replication to the first plea, *de injuriâ*; on which issue was joined.

At the trial before *Patteson, J.*, at the last Yorkshire assizes, it appeared that Joseph Waterworth, the husband of the defendant, had carried on business as a hair-dresser, and died intestate on the 3d of October, 1836. The defendant ordered and paid for the funeral; she continued to reside in the house, and the shop, through which was the entrance to the house, was kept open, but there was no express evidence that she had sold any articles there, or had carried on the business after her husband's death. In November 1836, she received notice of a bond debt of 100*l.* and interest due from her husband. On the 31st of December she caused an inventory to be made of her husband's effects, which were valued at 92*l.* On the 3d of January, 1837, the plaintiff sent in to the defendant an account of a debt due to him from her late husband, and she then gave the note on which this action was brought, for the amount of that debt. On the 6th of March letters of administration were granted to the defendant of her husband's effects.

On this evidence, it was contended for the plaintiff, first, that the defendant was liable for the debt as executrix *de son tort*; and secondly, that whether she was chargeable in that character or not, she had made herself liable on the note. The learned judge thought otherwise, and under his direction a verdict was found for the de-

defendant, leave being reserved to the plaintiff to enter a verdict for the amount of the note and interest.

Each. of Pleas,
1838.

SERLE

v.

WATERWORTH.

Wightman having obtained a rule accordingly, or for judgment *non obstante veredicto*, on the authority of *Ridout v. Bristow* (a),

Cresswell and *Addison* shewed cause.—The plea being proved in fact, the verdict rightly passed for the defendant. The question whether the plea was proved, turned on the point whether there was evidence to charge the defendant as executrix de son tort. The ordering and paying for the funeral was clearly not sufficient so to charge her; and the other acts done by her—for instance, the making out of the inventory—were only preparatory to her obtaining administration, and so investing herself with the rightful authority. This was a trade consisting principally in the exercise of a personal duty and personal skill, which would cease with the death of the person who had carried it on; very unlike that of a victualler, which was the case of *Hooper v. Summersett* (b), where living in the house and carrying on the trade was held a sufficient intermeddling to make the party an executor de son tort. Here the shop was necessarily kept open, the entrance to the house being through it, and there was no proof of any sales going on.

Secondly, the plea was a good defence in point of law. Unless the defendant was legally liable as executrix, there was no consideration for her giving the note. In order to constitute a sufficient consideration, there must have been some party liable at the time for the debt, otherwise no prejudice could be done to the plaintiff by the forbearance. *Ridout v. Bristow* is distinguishable: there the note was proved (under non assumpsit) to have been given

(a) 1 C. & J. 231.

(b) Wightwick, 16.

Exch. of Pleas,
1838.

SERLE
v.
WATERWORTH.

by *the widow* “for value received by her late husband;” here it does not appear on the face of the plea that the defendant was at all connected with the deceased: she is therefore, for the purpose of this argument, to be taken as a mere stranger, and the plaintiff cannot rest his case on any *moral* consideration. In *Jones v. Ashburnham* (a), the plaintiff declared that A., since deceased, was indebted to him for goods sold and delivered, and that after the death of A., in consideration of the premises, and that the plaintiff, at the instance of the defendant, would forbear and give day of payment of the debt, (not stating to whom,) the defendant promised to discharge it; this was held, on demurrer, to be no consideration for the promise, since, unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. That case was the same as the present, except that here a note was given, and the only difference which that makes is, that it throws the onus on the defendant to prove the want of consideration. Lord *Ellenborough* there says—“How does the plaintiff shew any damage to himself by forbearing to sue, when there was no fund which could be the object of suit; where it does not appear that any person in *rerum naturâ* was liable to be sued by him? Unless a right is capable of exercise, unless it can be put in force, there can be no suspension of it.” So here, there was no fund applicable at the time to the payment of this debt, nor any person liable to pay it. That being so, the forbearance constituted no consideration for the note.

Wightman (*Dundas* with him) in support of the rule.—The first question is, whether a party who remains for three months in possession of all the goods of her deceased husband, and then, on the application of his cre-

(a) 4 East, 455.

ditor, gives a promissory note for his debt, does not become liable as executrix de son tort. Much less intermeddling has been deemed sufficient; for instance, the merely taking a bedstead, or a Bible: *Noy*, 69. It is clear the defendant did not take possession of the goods with a view to hand them over to any body else.

Exch. of Pleas,
1838.

SENLE
WATERWORTH.

But, whether she be executrix de son tort or not, she is liable on this note. The facts are, that the defendant, being in possession of her husband's effects, gives a promissory note for his debt, and afterwards takes out administration. By giving the note she protects herself from any suit for twelve months, whereas otherwise the plaintiff could have sued her as soon as she took out administration. The suspension of that right of action was clearly a sufficient consideration. [Lord *Abinger*, C. B.—Would the note have been a bar to an action against her as administratrix?] Yes—the plaintiff having agreed to take it as a security. Suppose the defendant had pleaded that she was in possession of her husband's goods, and about to take out administration, and that, in consideration of being pressed for this debt, she gave the note in question,—would not that have been a good plea to an action against her for goods sold and delivered? [*Alderson*, B.—The question in *Ridout v. Bristow* was, whether, it being expressed on the face of the note that it was given for the debt of her late husband, that necessarily shewed a want of consideration; and it was held that it did not, because the plaintiff's remedy might be delayed against the executor or administrator; but here there is a distinct averment that no person was liable for the debt.] But not that there was no fund applicable to it. The defendant has the goods in her hands, and having them, on the application of the creditor, she gives a note, whereby the remedy is delayed for twelve months against any party who may in the mean time come in and have the rightful title. The plaintiff might have taken out administration

Exch. of Pleas,
1838.


SERLE
^a
WATERWORTH.

himself. The plaintiff is therefore entitled to judgment non obstante veredicto, inasmuch as the plea is no answer in law. It ought to exclude every possible consideration, and ought, therefore, to have shewn, not only that there was no person liable, but also that there were no assets out of which to satisfy the debt.

LORD ABINGER, C. B.—As to the first part of the rule, I am of opinion that the verdict on this issue was right, and that there was no sufficient reason for saying that the defendant was executrix de son tort. But, on the other point, I think the plaintiff is entitled to judgment non obstante veredicto. It appears to me that the real question is, whether on the face of the declaration and plea taken together, there could be any consideration for this note, as between the plaintiff and the defendant: and I think that the plaintiff's being placed in the condition that he could not, at all events, sue the defendant herself for twelve months, although she took out administration in the mean time, was a sufficient consideration. It appears that the intestate had assets, and therefore the plaintiff might have had a remedy against somebody; indeed, he would have had a right to take out administration himself as a creditor.

PARKE, B.—*Primâ facie*, no doubt the note imports consideration on the face of it; and the question is, whether this plea shews distinctly that there was none. If it had shewn that there were no assets, it would probably have gone far enough to negative all consideration; but it does not: and the effect of the note, at all events, is to tie up the plaintiff's hands against the defendant, in case she should take out administration or intermeddle with the assets, for a year. Therefore the plea does not go far enough to exclude all consideration. Whether the note would be a bar to an action against a third party who

might acquire the right of representation in the mean time, I give no opinion; but no doubt it would be binding as between themselves. I never heard it doubted, that when a party takes a note for a certain period, payable to himself, he cannot sue on the original contract during the currency of the note. I think, therefore, that there was here a sufficient agreement to forbear, to constitute a good consideration. This view of the case corresponds with that taken by *Bayley, B.*, in *Ridout v. Bristow*. The judgment, therefore, ought to be for the plaintiff, non obstante veredicto, on the confession in the plea of a cause of action, and the insufficient avoidance of it.

Exch. of Pleas,
1838.

SERLE
v.
WATERWORTH.

BOLLAND, B., concurred.

ALDERSON, B.—I agree that judgment ought to be entered non obstante veredicto. The verdict was right, because all the averments in the plea were proved; and the only question therefore is, whether the plea is good. Now a promissory note imports consideration: and *Ridout v. Bristow* determined this, that unless the defendant negative all possible consideration, the plaintiff is entitled to recover on the consideration implied in the note itself. Then, is there any possible consideration consistent with the allegations of the plea? I think there is; namely, that suggested by my Brother *Parke*, that at all events the plaintiff ties himself up against the defendant, in case she should take out administration, for a year.

Rule absolute for judgment
non obstante veredicto.

Exch. of Pleas,
1838.

LANCASTER v. WALSH.

A party who had been robbed of bank notes put forth a hand-bill, wherein it was stated, that "whosoever would give information whereby the same might be traced, should, on conviction of the parties, receive a reward of 20*l.*:"—*Held*, that the only person entitled to the reward was he who *first* gave information by which the notes were traced to the robbers, so as to ensure their conviction: and that it was not necessary that such information should be communicated to the party robbed, if it was given to a person authorized to receive it, and to act upon it in the apprehension of the offenders; as to a constable.

ASSUMPSIT.—The first count of the declaration stated, that the defendant, on the 29th July, 1835, printed and published a certain advertisement, by which it was stated, that on Saturday night then last, two Bank of England notes, one for 50*l.*, dated June 30th, and one for 30*l.*, dated June 18th, and other monies, had been and were stolen from the person of the defendant, therein described of Halifax, while on his way home; and that the defendant did thereby promise, that whoever would give information by which the same might be traced, should, on conviction of the parties, receive a reward of 20*l.* on application to him the defendant: and the plaintiff in fact said, that he, confiding in the said promise and undertaking of the defendant, afterwards, to wit, on &c., did give information by which the said notes and monies were traced, and did give information of, and discover and trace, one Benjamin Dyson, to the defendant, to be the party to the said offence, as in the said advertisement mentioned; and the said Benjamin Dyson afterwards, to wit, on &c., was committed to prison to answer for the said offence: and afterwards, at the general Sessions of Oyer and Terminer and general gaol delivery holden in and for the county of York, on the 27th day of February, 1836, the said Benjamin Dyson was in due manner and by due course of law convicted of the said offence; of which said several premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and the plaintiff did then apply to the defendant for the said sum of 20*l.*, so being such reward as aforesaid; by means of which said premises the defendant became liable to pay to the plaintiff the said sum of 20*l.*, when he should be thereunto afterwards requested, &c. &c. There were also counts for work and labour, and on an account stated.

The defendant pleaded to the first count : 1st. that the plaintiff did not give information in manner and form as in the declaration mentioned ; 2nd. that the said notes and monies were not traced by the information so given by the plaintiff in manner and form as in the declaration mentioned ; 3rd. that although the plaintiff did give the information in the first count mentioned, yet that another person, to wit, one James Illingworth, together with the plaintiff, gave the said information ; without this, that the plaintiff alone gave the said information, in manner and form, &c. To the other counts the defendant pleaded non assumpsit : and issues were joined on all these pleas.

Exch. of Pleas,
1838.

LANCASTER
v.
WALSH.

At the trial before *Patteson, J.*, at the last Yorkshire Assizes, the facts appeared to be as follows:—On the 25th of July, 1835, the defendant was robbed on the highway, near Halifax, by three or four men, of notes and money to the amount of 90l.; and the next week he inserted the following advertisement in a Halifax newspaper, and put forth handbills in the same terms:—

“Twenty Pounds Reward.

“Whereas, on Saturday night last, two Bank of England notes, one for 50l., dated June 30th, No. 19,994, and one for 30l., dated June 18th, No. 5148, and other monies, were stolen from the person of Mr. Richard Walsh, of Halifax, on his way home: Whoever will give information by which the same may be traced, shall, on conviction of the parties, receive the above reward, on application to the said Richard Walsh.—Halifax, July 29th, 1835.”

On the 1st of August, one Brigg, the deputy constable of Bradford, wrote the following letter to Brierley, a constable at Halifax:—“I have heard this morning who the party was that robbed Mr. Walsh, and if he can prove the number of the notes, I think it possible to make it

Exch. of Pleas,
1838.

LANCASTER
v.
WALSH.

out.”—On this letter being offered in evidence for the defendant, the plaintiff’s counsel objected that it was inadmissible, as being no part of the *res gesta*: the learned judge however admitted it. It further appeared that Brigg had received the information to which his letter referred from one Clark, to whom Benjamin Dyson had confessed that he was a party to the robbery, and that a 30*l.* note was among the property stolen. Clark was called for the defendant (Brigg being prevented from being a witness by an accident) and proved the confession to him by Dyson, and his communication of it to Brigg. Before that communication, James Illingworth, the constable of Wakefield, had discovered that the notes had been cashed at the Wakefield Bank, and had taken into custody the parties who presented them for payment, who, however, were not the actual robbers. On the 4th of August, the plaintiff gave the defendant information of Dyson being a party to the robbery. On the 5th, Brigg verbally communicated to Illingworth the information he had received: and, on the 14th, Dyson, who had absconded in the mean time, was apprehended by Brigg, and at the next York Assizes, was arraigned for and pleaded guilty to the robbery. On this evidence, the learned judge left it to the jury to say whether any information had been given, previously to that given by the plaintiff, which could lead to the tracing of the notes to the party who stole them; expressing his opinion that the person entitled to the reward was he who gave information whereby the property was traced to the offenders, not he who merely traced where it was. The jury found a general verdict for the defendant, and the learned judge gave the plaintiff leave to move to enter a verdict for him on the first and third issues.

In Easter term, *Alexander* obtained a rule nisi accordingly, and also for judgment non obstante veredicto on the second issue.

Cresswell and *Addison* now shewed cause.—The direction of the learned Judge was correct, and the verdict ought to stand. The argument advanced on the part of the plaintiff must be, not merely that *the first* person who gives information whereby the property is traced, but that any person who gives such information at any time, is entitled to the reward. If that were so, the party might have to pay many sums of 20*l.* instead of one: but it is plain the advertisement contemplates the payment of one single sum only. In *Fallick v. Barber* (*a*), where a reward was offered in similar terms to any party who should give information where a stolen child was, *Bayley, J.*, says—“The party promising to pay the reward, which consisted of one entire sum, could only be liable to one action at the suit of the person who gave the information whereby the child was restored to its parents.” And the meaning of this advertisement plainly was, not that the party, in order to entitle himself to the reward, should give information whereby the notes *might be* traced, but that he should receive it who gave information whereby they *were* traced. Then it was proved that, previously to the communication made by the plaintiff, information had been given to the constable who was the offender, and the jury have in effect found that he was apprehended by the constable in consequence of that information, and not of the plaintiff’s. [*Parke, B.*—The plaintiff’s argument is, that the handbill means that information should be given to the defendant himself, whereas the previous information by *Clark* was given only to the constable.] That cannot be material; it is sufficient if it be given to a party authorized to receive it, and to act upon it in the pursuit and apprehension of the offender. Had it been first communicated to the defendant, *he* must have applied to the constable. [*Alderson, B.*—It must certainly mean information given

Exch. of Pleas,
1838.

LANCASTER
v.
WALSH.

(*a*) 1 M. & Sel. 108.

Exch. of Pleas,
1838.

LANCASTER
v.
WALSH.

to a party authorized to receive and act upon it. Suppose the defendant himself had left the country after publishing the advertisement?]

Then it is said that the plaintiff is entitled to judgment non obstante veredicto on the second plea, for that it is consistent with that plea that the plaintiff gave the first information whereby (in the terms of the advertisement) the notes might be traced, although the defendant acted on other knowledge. But the declaration alleges that the plaintiff gave information whereby the notes *were* traced, and also gave information of and discovered the offender: and the plea traverses the first branch of that allegation. The plaintiff chooses to aver that he gave information whereby the notes were actually traced, and the plea is a simple denial of that allegation. [*Parke, B.*—You only take issue on his allegation—in whatever sense he alleges it, you deny it. If it be an immaterial traverse, his declaration is bad. It does not say “by which the notes and monies *might have been and were* traced.”] Then it is clear that the proper interpretation of the averment is, that the plaintiff gave the information whereby they were *first* traced, which is disproved by the evidence.

Alexander (W. H. Watson with him,) contrà.—No verbal communication was made by Brigg until the 5th of August, which was after the information given by the plaintiff. Until that time, therefore, unless the letter to Brierley was evidence, the defendant had received no other information than the plaintiff's, which led to the tracing of the notes or of the offender. But, first, that letter was not admissible; Brigg himself ought to have been called as a witness. It was no part of the *res gesta* between the parties in the cause. [*Lord Abinger, C. B.*—Surely the letter was *admissible*, as being not merely evidence, but the only evidence, of the *sort* of information given by Brigg to Brierley, and of the date of it. The effect of it

is another thing.] Then, if admissible, it did not give the kind of information contemplated by the advertisement: Brierley could not have acted upon it so as to obtain the conviction of the offender, without applying again to Brigg. But the first plea only raises this issue, that the plaintiff gave *no* information, whether before or after that given by any other; it only denies what the declaration alleges; and it is clear the plaintiff did give information in the terms therein stated. The “information by which the same might be traced,” means by which the offender might be traced and convicted: the notes might be traced without any facilities being afforded for convicting the offender. [*Parke, B.*—Then you reject the first part of the averment—that the plaintiff gave information by which the notes and monies were traced.] It is divisible. If the plaintiff proved the giving of information whereby the offenders were discovered, without any proof as to the tracing of the notes, he would be entitled to recover. [*Alderson, B.*—The tracing of the notes includes the tracing to the possession of the robber.] If so, then it is clear Brigg had not traced the notes in that sense.

Exch. of Pleas,
1838.

LANCASTER
v.
WALSH.

The third plea concludes with a special traverse, that the plaintiff *alone* gave the information mentioned in the declaration; but the declaration contains no averment that he alone gave it, and the effect of that issue is therefore no more than that of the first, viz. that the plaintiff did not give information; it is open therefore to the same answer—that the plaintiff *did* give information in the terms alleged by him.

Lastly, as to the second issue. Unless the tracing of the *notes* would alone have been sufficient to entitle the party to the reward, the second plea is immaterial; the defendant only says by it that the plaintiff did not do that which would have been insufficient to lead to a conviction. [*Alderson, B.*—The answer again is, that tracing the notes means tracing them back to the person who lost them.]

Exch. of Pleas,
1838.

LANCASTER
v.
WALSH.

LORD ABINGER, C. B.—This rule must be discharged. I am of opinion that the “information by which the same may be traced,” in this advertisement, means the *first* information that is sufficient for that purpose. After such has been given, it cannot be said that the party is informed by another telling him the same thing. It means, therefore, the first information whereby the robbery is detected and the offender punished. And it seems to me that such was the information given by Clark to Brigg, and by him to Brierley. With regard to the pleadings, the plea must be understood in the same sense as to the declaration; and the *tracing* there mentioned means a tracing of the notes to the offender as the means of his conviction. Then the letter from Brigg was not only admissible, but was the only proper evidence of the information given by him; whether it was *material* depended on the terms of it. It fixes, however, the date of Brigg’s communication, which was the 1st of August, the plaintiff’s being the 4th; and it states that the writer knew who the robbers were. The notes having been already traced, all that was wanted was to connect the robbers with the possession of them: and that information was rightly communicated to the constable; it was not necessary to shew that he had disclosed it to the defendant.

PARKE, B.—I concur in thinking that the rule ought to be discharged: and if it be discharged as to entering a verdict on the first and third issues, it is immaterial to consider the application as to the second, although I have no doubt on that also. The first and third issues raise in substance the same question:—The first issue is, did the plaintiff give the information stated in the declaration—that is, information in the terms of the advertisement? The third is substantially the same: for if it means to apply to two persons who jointly acquired and gave the same information, the plaintiff alone could not sue; which

therefore comes to the same question, whether the plaintiff gave the information intended by the advertisement? Then we are to look to the advertisement, to see what are the terms on which the reward is to be had. Now, in the first place, it is clear that the defendant intended to offer only *one* reward, to be paid on conviction of the offenders. And it seems to me equally clear that it is to be given for such information as shall trace the notes to the offenders, and procure their conviction. The plaintiff, therefore, who has to make out his case, must shew that the information which he gave was that which traced the notes to Dyson, and procured his conviction: and if there is to be but one reward alone, the party *first* giving that information, and he alone, is to have the benefit. I think the learned judge was right in thinking that the plaintiff was not the first. There was evidence that Clark had previously heard a confession from Dyson that he was a party to the robbery, and that he had communicated it to Brigg: and it seems to me that any communication to the constable, whose duty it was to search for the offender, was within the terms of the handbill, although there was no proof of a communication to the defendant himself. I think, therefore, that the evidence sufficiently negatived the fact of the plaintiff being the first who gave information whereby the notes were traced to the offender, so as to secure his conviction.

Exch. of Pleas,
1838.

LANCASTER
v.
WALSH.

BOLLAND, B.—I think the learned Judge was quite right in leaving it to the jury, whether the plaintiff gave the first information in the sense of the hand-bill. The finding of the notes at the bank was not a *tracing* of them—the tracing is to ensure the conviction of the thief. And I think the jury found a right verdict on the direction so given to them. I am of opinion also, that the letter was properly received in evidence, for the reasons already given, in which I perfectly concur.

Exch. of Pleas,
1838.

LANCASTER
v.
WALSH.

ALDERSON, B.—I am of the same opinion. According to the proper meaning of the English language, the term “*first* information” is a tautologous expression. *Information* means the communication of material facts for the first time. What is more common than when a man is told a piece of *old news*, to say “this is no information?” Therefore the word is so to be understood in the declaration. Now, is there any thing in the hand-bill which alters the sense? On the contrary, any other construction makes nonsense of it. Then the plaintiff is not the party who first communicated material facts which led to the conviction of the offender. The direction of the learned Judge was therefore right, and the verdict equally right. And I quite concur that a communication to an authorized party, such as a constable, is sufficient.

Rule discharged.



HALL and Others v. ROUSE.

Where a verdict was taken at Nisi Prius, and entered in the associate's book (but not on the record), subject to a reference, and the time limited for making the award expired before the order of reference was delivered to the arbitrator, when the defendant refused to proceed with the reference; whereupon the plaintiff, without making any application to the Court, took the cause down again to trial, and obtained a second verdict:—*Held*, that the latter trial and verdict were irregular.

THIS cause came on for trial at the Liverpool Summer Assizes, 1837, when a verdict was taken, and entered by the associate in his minute-book, for 1000*l.*, the damages laid in the declaration, subject to the award of a barrister, to whom the cause and all matters in difference between the parties were referred by order of Nisi Prius, and who was to have power to reduce the damages, or to vacate the verdict and to enter a nonsuit; the award to be made and published on or before the 1st of November then next, with power to the arbitrator to enlarge the time as he should think fit. The order of Nisi Prius was obtained

Held, also, that the irregularity was not waived by the defendant's attorney attending and cross-examining a witness, under an order obtained by the plaintiff's attorney (after the other party had refused to go on with the reference) for the examination of the witness on interrogatories, under the 1 Will. 4, c. 22, s. 4.

from the associate by the plaintiffs' attorney, but he omitted to deliver it to the arbitrator until after the expiration of the time within which the award was to be made. The parties, however, subsequently met before the arbitrator, but the defendant refused to proceed. It was then stated that the cause would be set down again for trial; and on the 18th November, the plaintiffs' attorney obtained an order, under the 1 Will. 4, c. 22, s. 4, to examine a witness of the name of Howard, who was very ill, upon interrogatories. Examiners were accordingly appointed, and the defendant's attorney attended and cross-examined the witness, whose examination was concluded. No award was made, and no judgment was entered upon the record on the former verdict. The plaintiffs afterwards gave notice of trial for the Spring Assizes, 1838, and entered and tried the cause. The counsel for the defendant objected to the proceedings, but the trial being pressed on, they offered no further defence, and the cause was taken as an undefended one.

Exch. of Pleas,
1838.

HALL
v.
ROUSE.

On a former day in this term, *Cresswell* obtained a rule to set aside the second verdict, on the ground that the trial was irregular, so long as the first verdict remained on the record, which had not been in any way vacated or set aside.

Hoggins now shewed cause.—Even if there has been an irregularity in this respect, the defendant has no right to complain of it, having consented to waive it by the steps he has taken since he knew that the arbitrator had not the power to make an award, and had himself refused to proceed with the reference. By attending under the order for the examination of the witness Howard, and cross-examining him on that occasion—which could only have reference to a second trial of the cause—the defendant has expressly recognised the propriety of its being sent down again to trial. But in the next place, the proper course has been

Exch. of Pleas,
1838.

HALL
v.
ROUSE.

pursued under the circumstances. No award having been made within the time limited, the plaintiff had a right to take down the cause again: *Harper v. Abrahams* (a), *Hall v. Phillips* (b). [*Parke, B.*—'Those cases were before the new statute, and in one of them the arbitrator had died; but now, although the time have expired, it may be enlarged on application to the Court under the 3 & 4 Will. 4, c. 42, s. 39; and if you can go on with the reference, it is difficult to see how the verdict can be got rid of unless by the plaintiffs' consent, or by some waiver.] There has been no entry of the verdict on the postea; the act therefore does not apply.

Cresswell and *J. Henderson*, in support of the rule.—*Evans v. Davies* (c) is a distinct authority, that where a verdict has been taken subject to a reference, it is irregular to take the cause down again to trial, without applying for leave to do so, while that verdict is in existence. It makes no difference that the verdict has not been entered on the record, which could not be done until the award was made. [*Alderson, B.*, referred to *Bacon v. Cresswell* (b), as an authority to the same effect.] Secondly, there has been no waiver of the irregularity. It is clear that the order of reference has not become a nullity by the expiration of the time, inasmuch as either party might have applied to the Court to have the time enlarged, even after it had expired: *Potter v. Newman* (e), *Burley v. Stephens* (f). The order of reference therefore being still in existence, the attending and cross-examining the witness on interrogatories implied no consent to the subsequent irregularity: an order of that kind is made prospectively, and it is assumed that the party obtaining it

(a) 4 Moore, 3.

(b) 9 Bing. 89.

(c) 3 Dowl. P. C. 786.

(d) Hodges, 189.

(e) 2 C. M. & R. 742.

(f) 1 M. & W. 156.

will do all that is necessary to put himself in a position to use the examination regularly at a subsequent trial. No doubt the examination is good, and the evidence taken under it will be receivable on a new trial.

Each. of Pleas,
1838.

HALL
v.
ROUSE.

PARKE, B.—I am of opinion that the rule ought to be absolute to set aside the verdict, and for a new trial. I was certainly impressed at first with the idea that there had been a waiver of the irregularity, and indeed had some doubt whether there was any irregularity at all, there being no entry of the verdict or the record; I think, however, that makes no substantial difference; the order of reference is an admission that there has been a verdict: then the case of *Evans v. Davies* is a clear authority that that verdict must be got rid of before the cause can be tried again. There has therefore been an irregularity, unless both parties have agreed to waive it. The plaintiffs have undoubtedly shewn every disposition to do so; and if there had been any act done by the defendant shewing his assent—not a mere non-feasance, but such a one as necessarily imported that a second trial was to take place—I should have thought he had waived the irregularity also, and that the verdict ought not to be disturbed, or at all events only on payment of all costs. At first I was struck with the argument that the cross-examination of the witness under the order was such an act done by the defendant; but that argument proceeds on the assumption that no valid order could be made for such examination, while the former verdict remained. But on looking at the statute, it seems to me that an order for the examination of a witness on interrogatories would not necessarily be invalid, although a former verdict still stood;—being made prospectively with reference to a new trial, in case the verdict should be set aside. If it were otherwise, it would be invalid if made after a rule nisi for a new trial was granted, and while it was pending. The act

Exch. of Pleas,
1838.

HALL
v.
ROUSE.

contains no words of restriction whatsoever. It seems to me, therefore, that there was no waiver: and the rule must be absolute to set aside the verdicts, and for a new trial, in which the depositions of the witness Howard are to be read in evidence, and his examination to be considered as taken under a valid order.

BOLLAND, B., concurred.

ALDERSON, B.—I am of the same opinion. The proper and regular course, as appears from the case of *Bacon v. Cresswell*, would have been to apply to the Court for leave to retry the cause at the next assizes, notwithstanding the former verdict. But that regular course may be waived by consent of the parties. In this case I do not think the cross-examination of the witness by the defendant's attorney was any waiver of the irregularity of the second trial. It may have taken place on the tacit condition that the plaintiffs should put themselves into a position to try the cause regularly at the next assizes; and a valid order might be made on that supposition, although the former verdict was pending.

GURNEY, B., concurred.

Rule absolute.

THOMAS v. JONES.

Before the new rule of Hilary Term, 2 Will. 4, s. 65, a motion for arrest of judgment, or for a venire de novo, must, in this Court, have

been made within the four first days of the term next after the trial.

The new rule applies to trials out of term as well as in term. All such motions, therefore, in any of the Courts, must now be made within the four first days of term which next occur after the trial.

THIS was an action of debt for wages, and came on for trial before *Williams, J.*, at the last Carnarvon Assizes. After a full jury had appeared, the defendant challenged the array, on the ground that the plaintiff's attorney was the under-sheriff, and had summoned the jury. The

plaintiff denied the truth of the challenge, and the challenge and answer having been put on parchment, and annexed to the record, the learned Judge was applied to to appoint triers, and to try the challenge, which he declined to do, and the cause proceeded. The defendant gave evidence of a set-off as a defence to the action, but the plaintiff had a verdict for 20*l*.

Exch. of Pleas,
1838.

THOMAS
v.
JONES.

In Easter Term (but not within the first four days of the term) *Welsby* obtained a rule nisi to arrest the judgment, citing *Rex v. Edmonds* (a).

Jervis (*Meeson* with him) now shewed cause.—First, this application was too late, not having been made within the first four days of the term. That was the practice of this Court, which followed in this respect the practice of the Common Pleas and not of the King's Bench, even before the new rules: *Lane v. Crockett* (b), *Weston v. Foster* (c). But the rule of H. T. 2 Will. 4, s. 65, puts the case beyond doubt: it directs "that no motion in arrest of judgment, or for judgment non obstante verdicto, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, provided the jury process be returnable in the same term." It will be said that this rule applies only to trials in term; but it was made in order to assimilate the practice of all the courts, and it cannot have that effect unless it be applied to all cases.

But further, this application ought to have been for a venire de novo, not for an arrest of judgment: *Rex v. Edmonds*. And lastly, the defendant having, after the issue joined on the challenge of array, gone on with his defence, and fought out the case, is not entitled to make any application to the Court. If he intended to stand on

(a) 4 B. & Ald. 471.

(b) 7 Price, 566.

(c) 2 Bing. N. C. 701; 3 Scott,
155, 164.

Each. of Pleas,
1838.

THOMAS
vs
JONES.

this defence, he ought to have withdrawn when the learned Judge declined to entertain it. *Brunskill v. Giles (a)*. -

Welsby, contra.—Under the old practice, this motion might have been made at any time before judgment was actually signed. In Manning's Exchequer Practice, 353, that is laid down as the practice of this Court, and *Taylor v. Whitehead (b)* and other cases are cited as authorities for it. [*Alderson*, B.—Those are all cases in the King's Bench, and several of them criminal cases : a court of criminal judicature would be ready to interfere at any time before punishment, and its practice might therefore be different from that of the other courts in which civil suits are entertained.] It is quoted by the learned author as being identical with the practice in the Exchequer. *Lane v. Crockett* can hardly be considered as any authority the other way; the matter appears to have been very abruptly disposed of. Then if such was the old practice, the new rule has not altered it. It appears to be assumed by *Coleridge*, J., in *Brook v. Finch (c)*, that the rule applies only to trials in term: and *Bosanquet*, J., in *Weston v. Foster*, also expresses doubts on the subject.

But it is said the application should be for a venire de novo. That may be granted on this motion: *Leach v. Thomas (d)*. And there is no authority that *that* application, which differs essentially from a motion for a new trial, need be made within the first four days of term.

PARKE, B.—We are of opinion that this objection must prevail. I think that now every application to arrest the judgment, and I should say also for judgment non obstante veredicto, must be made within the first four days of term.

(a) 2 Moo. & Sc. 41.
(b) Dougl. 745.

(c) 6 Dowl. P. C. 313.
(d) 2 M. & W. 427.

The object of the new rule was to assimilate the practice of all the Courts where it had previously differed; but even if this case is not within it, it appears from the case of *Lane v. Crockett*, that the old practice in this Court, which followed in this respect the practice of the Common Pleas, was that the motion must be made within four days of the return of the *distringas* or *habeas corpora*: and no authority has been cited to the contrary, except a suggestion in Mr. Manning's Book of Practice, for which he cites only cases from the King's Bench, in which court, undoubtedly, the practice was that the motion might be made at any time before judgment signed. I think, therefore, that in the first place, the new rule applies to all cases, and means that the motion must be made within the four days of term which next occur after the trial; but that whether this be so or not, we have sufficient authority for saying that we should adopt the rule in the Common Pleas, and not in the King's Bench. And it is not an unwise rule, because the defendant may still have his remedy by writ of error, and the plaintiff has then the benefit of bail in error. The rule must therefore be discharged.

Exch. of Pleas,
1838.

THOMAS
v.
JONES.

BOLLAND, B., referred to Tidd's New Practice, 538.

ALDERSON, B.—In *Weston v. Foster*, Park, J., throws some doubt on the authority of *Taylor v. Whitehead*, and states that throughout his experience, the practice in the King's Bench had been to reserve leave to move in arrest of judgment, on moving for a new trial. If, however, this court had followed the practice of the Court of King's Bench, and not of the Court of Common Pleas, I should have thought the reasonable construction of the new rule was, that such an application should not be allowed, after the party has had four days of term after the trial in which to move it.

Rule discharged.

Exch. of Pleas,
1838.

JONES v. RYDER.

A promissory note, improperly stamped, is not admissible as a memorandum to take the case out of the Statute of Limitations, under the 9 Geo. 4, c. 14, s. 8. That section applies only to instruments which might be stamped with an agreement stamp.

A mere parol statement of an antecedent debt, without any new contract or consideration, made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the Statute of Limitations.

DEBT in 15*l.* for interest, and in 20*l.* on an account stated. Pleas, *nunquam indebitatus*, and the statute of limitations. At the trial before *Williams, J.*, at the last Montgomeryshire assizes, the only witness called for the plaintiff was his sister, who stated as follows:—"On the 5th of January, 1832, the defendant came to the plaintiff's house, and said he was come to settle with him. The defendant asked for the old note. An old account for 32*l.* was produced; it was for money the defendant had had upon use: the defendant put it into the fire. There was 12*l.* from the old account, and 3*l.* they put to it; they reckoned it up 15*l.*: then the defendant made a new note." The note so made was then put in and proved by the witness; it was as follows:—

"Upon demand, I promise to pay to Jeremiah Jones the sum of 15*l.*, with lawful interest for the same, for value received this 5th day of January, 1832.

"R. RYDER."

"The mark of

X

Elinor Jones."

The note, however, on its production, appeared to be on a 1*s.* instead of a 1*s.* 6*d.* stamp, and was therefore objected to as inadmissible, on the authority of *Green v. Davies* (a), and *Jardine v. Payne* (b). The plaintiff's counsel contended that it was admissible, at all events, as a memorandum in writing to take the case out of the Statute of Limitations, under the 8th section of Lord Tenterden's Act, 9 Geo. 4, c. 14; and cited *Morris v. Dixon* (c); and further, that the parol statement of ac-

(a) 4 B. & Cr. 235; 6 D. & R. 306.

(b) 1 B. & Adol. 663.

(c) 4 Ad. & E. 845; 6 Nev. & M. 438.

count constituted a sufficient cause of action within the six years: *Smith v. Forty* (a). The learned Judge allowed the note to be read, and directed a verdict for the plaintiff for 15*l.* debt, and interest 4*l.* 12*s.* 6*d.*, giving the defendant leave to move to enter a nonsuit, or to reduce the damages by the amount of the interest.

Exch. of Pleas,
1838.

JONES
v.
RYDER.

Alexander having obtained a rule accordingly—

Jervis now shewed cause.—It may be admitted that, upon the authority of the cases cited at the trial, the note, being upon a wrong stamp, could not be read as evidence of the account stated. But, in the first place, the plaintiff was entitled to recover on the parol statement of account proved by the witness, independently of the note: *Smith v. Forty*. It appeared that there had been an original debt of 32*l.* due from the defendant, and then an account was come to of the balance remaining due, and the old account being asked for and produced, the defendant destroyed it. What passed between the parties amounted to a consideration for a new promise to pay the 15*l.*, which consisted of the 12*l.* remaining due of the old debt, and the 3*l.*, apparently interest, added to it. [*Parke, B.*—I do not see that there was any new consideration. A mere parol acknowledgment within the six years of an antecedent debt cannot be sufficient: there must be a new contract.]

Secondly, the note was admissible as an acknowledgment, signed by the party charged, to take the case out of the Statute of Limitations, by virtue of the 9 Geo. 4, c. 14, s. 8, being a memorandum made necessary by that act: *Morris v. Dixon*. It is said on the other side that that provision applies only to such instruments as are in their nature agreements. But the question is only for what

(a) 4 Car. & P. 126.

Exch. of Pleas,
1838.

JONES
v.
BYDER.

purpose the instrument is used. The judgment of *Cole-ridge, J.*, in *Morris v. Dixon*, is applicable to the present case:—"This was an instrument made necessary by the 9 Geo. 4, c. 14, for barring the Statute of Limitations, and it was used for no other purpose. If there had been no other evidence of the original debt, I should have thought it was used to prove that." [*Parke, B.*—The distinction between the cases is, that there the instrument could only be stamped with an agreement stamp, the necessity for which was done away with by the act of Parliament; but here the only stamp that could be imposed was a promissory note stamp.] If the statute is to be so much limited in construction, its operation will be almost entirely defeated. The inquiry should rather be, whether the instrument is a writing made necessary by the act, and used for the purposes of the act: if so, it is exempted from stamp duty.

Alexander and Welsby, contra, were stopped by the Court.

PARKE, B.—I am reluctantly compelled to come to the conclusion, that the objection to the admissibility of this document must prevail, and that the rule must be made absolute for a nonsuit. Two points have been made on the part of the plaintiff. First, it is said there was evidence given at the trial, independently of the promissory note, to shew an account stated between the parties, on which the action could be maintained. It was proved that the parties met at the plaintiff's house, when the defendant said he came to settle, and asked for the old note. An old account for 32*l.* was then produced, which the defendant put into the fire: 12*l.* was remaining from that, which was made up to 15*l.*, and then the defendant gave a new note. Now, nothing appears from this statement to shew that the parties intended to convert the interest then due into principal: if it had, perhaps the case of *Smith v. Forty*

might apply. In that case it was agreed that interest should run from the date of the account. But there is no instance in which the case has been taken out of the statute, on the ground simply that there has been a parol statement between the parties of a debt before ascertained. Secondly, it is contended that the note might be read as an acknowledgment under Lord Tenterden's Act. Now, the general principle is, that every instrument ought to be stamped according to its legal operation: this is clearly a promissory note, and cannot be used as an agreement, and as evidence of an existing contract. Then the effect of the eighth section of Lord Tenterden's Act is, that if the instrument be such as would operate as an agreement, and is made necessary by the act, no stamp need be imposed upon it. But upon this paper no agreement stamp could ever have been imposed; and the case appears to me distinguishable upon this ground from that of *Morris v. Dixon*, where the instrument could operate only as an agreement. The result therefore is, that when parties mean to make an instrument solely to prevent the operation of the Statute of Limitations, they must take care not to import into it terms which will make it liable to stamp duty as a promissory note. Here the instrument is clearly a promissory note on the face of it, and being improperly stamped, cannot be used for any purpose.

Each. of Pleas,
1838.

JONES
v.
RYDER.

BOLLAND, B., concurred.

ALDERSON, B.—The Stamp Act, 31 Geo. 3, c. 25, s. 19, says, that “no promissory note shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful or available in law or equity, unless the same be duly stamped.” This is clearly a promissory note; it follows that it cannot be received at all: and if so, there is nothing to take the case out of the statute.

Rule absolute for a nonsuit.

Exch. of Pleas,
1838.

KING v. BENNETT.

A testatrix devised lands (after the death of devisees for life) to the second son of J. K. in fee. At the time of making the will, J. K. had had three sons, but two of them had died previously. Afterwards, and in the testatrix's lifetime, J. K. had a son, H., (who died in her lifetime), and another son, John, who survived her:—*Held*, that John took under the devise.

THE following case was stated by consent under a Judge's order for the opinion of the Court.

On the 25th of May, 1837, the plaintiff put up for sale by public auction a dwelling-house and premises in the county of Gloucester, subject, among others, to the following conditions of sale, that is to say, that the purchaser should immediately pay down a deposit, in proportion of 10% for every 100% of his purchase-money, into the hands of the vendor's agent, and sign an agreement for the remainder on or before the 11th day of October then next, at &c., at which time and place the purchase was to be completed, and the purchaser was to have possession of the property; all outgoings up to that time were to be cleared by the vendor:—that the vendor should at his own expense, on or before the 1st day of July then next, prepare and have ready for delivery at &c. an abstract of his title to the property, and should deduce a good title thereto: that the purchaser should, on or before the 1st day of August then next, deliver a statement in writing of his objections, if any, to the title, and in default thereof should be considered as having accepted the same, and all objections not then made should be considered as waived; and in case any objection should be taken to the title, it should be in the power of the vendor to annul the sale, and return the deposit money to the purchaser, in full satisfaction of all damages, costs, and charges which such purchaser should sustain: that upon payment of the remainder of the purchase-money at the time above mentioned, the vendor should convey the property to the purchaser; the purchaser at his or her own expense to prepare the conveyance to him or her, and to tender or leave the same on or before the 1st day of September then next, at &c., for execution by the vendor. And there-

upon the defendant became and was the highest bidder for the said premises, at and for the sum of 905*l.*, and was declared so to be, and signed an agreement to complete his purchase according to the said conditions.

Exch. of Pleas,
1838.

KING
v.
BENNETT.

Sarah Hewitt, being seised in fee of certain premises, and, among others, those put up for sale as aforesaid, by her will, bearing date the 23rd day of December, 1811, and duly executed to pass real estates, devised the said premises so put up for sale as follows :—I give and devise my messuage, outhouses, courts, gardens, orchards, and three closes of ground, with the tithes and appurtenances thereof, situate at Kilcott, now in the occupation of John Morris, and also a little close in Kilcott aforesaid, called Giddy Nap, in the occupation of — Hiscox, unto John Morris and Ann his wife, and the survivor of them, for and during their lives, and the life of such survivor : and from and after the death of such survivor, I give and devise the last mentioned messuage, &c. and premises, unto Sarah, the wife of John King, Esq., and one of the daughters of William Holborow the elder, for and during her life ; and after her decease, unto the said John King, if he survives her, for and during his life ; and from and after the decease of the survivor of them the said John King and Sarah King his wife, I give and devise the same last mentioned messuage, &c., and premises, unto *the second son* of them the said John and Sarah King, and the heirs and assigns of such second son for ever.

At the time of making this will, the said John and Sarah King, in the will named, had had three sons, Elisha, John, and William George ; but William George was the only one then living, Elisha having died in the month of August, 1809, and John in the month of May, 1811 (a). The testatrix died in the year 1821. In the month of

(a) It was agreed that it should be taken as a fact in this case, that the testatrix knew the circumstances of the family.

Each. of Pleas,
1838.

KING
v.
BENNETT.

May, 1813, the said John and Sarah King had a fourth son, Henry King, who died in the month of April, 1814; and in the year 1815 they had a fifth son, John Henry King, the present plaintiff. William George King is now alive: John Morris and Ann his wife, and John and Sarah King, who are respectively named in the will, were all dead some time before the said sale. The plaintiff, within the time mentioned in the conditions, prepared and delivered an abstract of title to the premises, wherein he assumed himself to be entitled thereto in fee, as the second son of John and Sarah King, by virtue of the will of Sarah Hewitt: and the defendant, within the time mentioned in the conditions, objected to the title so produced, on the ground that the plaintiff was not the second son of John and Sarah King, according to the true construction of the will of Sarah Hewitt.

The question for the opinion of the Court is, whether the plaintiff has a good title in fee simple to the premises so put up to sale. If he has, a judgment is to be entered for the plaintiff by confession, for 814*l.* 10*s.* If the Court should be of opinion that he has not, judgment of nolle prosequi is to be entered for the defendant.

R. V. Richards, for the plaintiff, relied on *Lomax v. Holmden* (a), and *Driver v. Frank* (b).

Stephen, Serjt., for the defendant.—Supposing the testatrix to have known that the two first sons were dead, the question is, whom she intended by the description of “the second son” of John and Sarah King. The defendant contends that it must be construed to mean Henry, who was the second son born after the making of the will. It can make no difference that he afterwards died in the life-

(a) 1 Ves. sen. 294.

(b) 3 M. & Sel. 29; S. C. on error, 8 Taunt. 468; 6 Price, 41.

time of the testatrix: that would only make it a lapsed devise; but it is a principle well established that no testator is supposed to contemplate a case of lapse: *Ulrich v. Lichfield* (a). It is clear the testatrix could not mean the second son in the actual order of their birth: and the most reasonable interpretation therefore is, that she meant the son who should be second in order of birth after the date of her will. [*Alderson, B.*—Suppose William George had died instead of Henry, what then?] Henry would still have taken, although he became the eldest. *Trafford v. Ashton* (b), and *West v. Lord Primate of Ireland* (c), are authorities in favour of the defendant. In the latter case, the testator, by his will, had desired that his executor should, at his (the executor's) decease, bequeath 1000 guineas to Lord Cantalupe, for the use of his seventh, or youngest child in case he should not leave a seventh child living. At the death of the testator, Lord C. had six children only living, a seventh having been born and died. Several children were born afterwards, of whom the plaintiff was the first, and he claimed the legacy as being the seventh: but it was held that as he was in fact the eighth in order of birth, he could not take, and the Court decreed in favour of the youngest child. Here the testatrix meant that a son born after the date of the will should take, without reference to his dying in her lifetime, which she cannot be taken to have contemplated. Suppose Henry had left issue—would they be excluded? That would be a palpable violation of the testatrix's intentions; yet if it is to be assumed that the will has reference to the period of her death, that will follow: but if she contemplated his dying in her lifetime, she must also have contemplated the possibility of his leaving issue. It was a well understood rule, before the recent statute, that as to personalty a will

Exch. of Pleas,
1838.

KING
v.
BENNETT.

(a) 2 Atk. 375.

(c) 3 Bro. Ch. C. 448; 2 Cox,

(b) 2 Vern. 60; Eq. Ca. Abr. 258.

Erech. of Pleas,
1838.

King
v.
BENNETT.

spoke from the death, but as to realty from its date. *Second* is a relative term, and always respects the question whom the testator means as the *first*. Did not this testatrix refer to the first son then living? If so, she must have meant the second relatively to him—that is, Henry, who was the next born. In *Driver v. Frank*, no doubt the party who was held entitled was the second son at the death; but the question was not between him and a son born after the date of the will. *Lomax v. Holmden* is certainly irreconcilable with the defendant's argument.

Richards, in reply.—As to the argument, what would have been the effect if Henry had left issue, supposing the legacy to lapse, as the defendant contends, they would equally lose it. In *Trafford v. Ashton*, the son who took was a son born *after the death* of the testator; the law then looks to the state of the family at that time, and they take as they afterwards come in esse. *West v. Lord Primate of Ireland* turned on the particular words of the devise. But *Lomax v. Holmden* is decisive for the plaintiff.

LORD ABINGER, C. B.—It appears to me that this case is governed by *Lomax v. Holmden*. All the argument in favour of the defendant is put to flight as soon as you get out of the difficulty of taking the second son in the order of birth. The testatrix could not mean that second son, because at the date of her will only one was living. Then whom did she mean? The defendant says, the second with reference to the first then living: but I do not agree in that construction. Suppose the elder had died—then the second would be the eldest. It is said, suppose he had left issue, what would be the result? The same difficulty would have occurred, but with more force. We cannot construe the will except with reference to its date,

as to the testatrix's death : and if from the circumstances it cannot be construed with reference to its date, because there was then no second son living, it must be read with reference to the death : and must mean such son as shall be the second son—i. e. the next to the eldest son—at the time of the testatrix's death. If the testatrix had meant what the defendant contends for, she would have altered her will according to the change of circumstances. I am of opinion, therefore, that this case is governed by the authority of *Lomax v. Holmden*, and that the plaintiff is entitled to judgment.

Esch. of Pleas,
1838.

KING
v.
BENNETT.

BOLLAND, B.—I am of the same opinion. It could not be said that William George could in any view be considered as the second son. That being so, to what are we to look in order to satisfy the will? It seems to me, to the state of circumstances at the time of the testatrix's death. It might be that knowing the eldest son would be otherwise provided for, she did not mean in any case to make him the object of her bounty.

ALDERSON, B.—I am of the same opinion. If you take the period of making the will, the testatrix could not contemplate a gift but to a party thereafter to be born : for William George could not fulfil her intention, either in the order of birth or with reference to present circumstances : he had been the third son, and was then the first. Then the rule laid down by Lord *Hardwicke* is, that if the will cannot apply to any person in existence when the will was made, we must look to the time of the testator's death. If so, John was clearly the second son at that time, and fulfilled the terms of the will. It is said that Henry, who was afterwards born, was contemplated. That is directly in conflict with the principle laid down by Lord *Hardwicke*, that the will shall not speak from those intermediate periods. My Brother Stephen puts the case

Exch. of Pleas,
1838.

King
v.
BARNETT.

of his having left issue—then they would have lost the property, even on his own argument, it being a case of lapse. *West v. Lord Primate of Ireland* is distinguishable; the Court there looked at the death of the executor of the testator, as the period of time to which the will was to apply. At the time of the testator's death, no seventh child of Lord Cantalupe was living; but at the death of the executor, Lady Matilda West was the youngest, and therefore the only person who could take.

Judgment for the plaintiff.

RHODES v. SMETHURST, Administratrix of HOBSON,
Deceased.

It is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted.

ASSUMPSIT on a promissory note for 2500*l.*, dated the 13th May, 1818, made by the intestate James Hobson in his lifetime, payable to the plaintiff or order on demand. There were also counts for money lent, money had and received, interest, and on an account stated. Third plea, *actio non accruit infra sex annos*. Replication thereto, so far as the same related to the first count of the declaration, that the cause of action in that count mentioned accrued to the plaintiff within six years next before the time of the death of the said James Hobson, to wit, on the 1st of May, 1829; and that afterwards, to wit, on the 13th day of May, 1830, the said James Hobson died, having therefore, on the 8th day of February, 1817, signed a certain testamentary paper purporting to be his last will and testament, and thereby then named and appointed the plaintiff and one Betty Hobson, (which said Betty Hobson died in the lifetime of the said James Hobson,) executor and executrix thereof, and having afterwards in his lifetime, to wit, on the 11th day of December, 1829, signed a cer-

Exch. of Pleas,
1838.

RHODES
SMITHURST.

mentioned, as the last will and testament of the said James Hobson, deceased, should be granted to the plaintiff; whereupon the defendant then appealed against the said decree to the Chancery Court of York, and such proceedings were thereupon had, that afterwards, to wit, on the 26th day of July, 1833, the said decree of the said Consistory Court of Chester was, by the Right Worshipful Granville Harcourt Vernon, Master of Arts, Official Principal of the said Chancery Court of York, reversed, annulled, and rescinded, and the defendant was then, by the said Granville Harcourt Vernon, as such official principal of the said last-mentioned Court, declared to be entitled, as the next of kin of the said James Hobson, deceased, to the administration of all and singular the goods and chattels, rights and credits of the said James Hobson, deceased, at the time of his death, with the said testamentary paper hereinbefore secondly mentioned, as the last will and testament of the said James Hobson, deceased, annexed; whereupon the plaintiff then, to wit, on the day and year last aforesaid, appealed against the said last-mentioned decree to the most Noble and Right Honourable the Judicial Committee of the Privy Council of his late Majesty King William the Fourth; and such proceedings were thereupon had, that afterwards, to wit, on the 2nd day of February, 1835, by a certain report then made to his said late Majesty in Council by the said Judicial Committee, it was then reported and recommended that the said decree of the said Chancery Court of York should be affirmed, and that administration of all and singular the goods and chattels, rights and credits, which were of the said James Hobson, deceased, at the time of his death, with the said testamentary paper hereinbefore secondly mentioned as the last will and testament of the said James Hobson, annexed, should be granted to the said defendant; which said report was afterwards, on the 18th day of the said month of February, by his said late

Majesty in Council duly affirmed : in pursuance whereof, afterwards, and not at any earlier period, to wit on the 18th day of June, 1835, administration of all and singular the goods and chattels, rights and credits, which were of the said James Hobson, deceased, at the time of his death, with the said last will and testament of the said James Hobson annexed, was duly granted to the defendant ; and the plaintiff in fact further saith, that until the said grant of administration so made to the defendant as aforesaid, there was not at any time from the time of the death of the said James Hobson, any legal personal representative of the said James Hobson, deceased, or any other person whatsoever liable to the plaintiff, and against whom the plaintiff could commence any action or suit in respect of the said causes of action in the said first count mentioned ; and that within a reasonable time, that is to say, within the space of three months after the said grant of administration to the said defendant as aforesaid, to wit, on the 12th day of September, 1835, the plaintiff issued his writ of summons out of the said Court here, and thereby commenced his said action against the defendant, as such administratrix as aforesaid, in respect of the said sums of money and causes of action in the said first count of the said declaration mentioned ; and the plaintiff in fact says, that the said periods which respectively elapsed between the accruing of the said causes of action in the said first count mentioned, and the time of the death of the said James Hobson, and between the said grant of administration to the defendant as aforesaid, and the time of the commencement of this suit, do not together amount to the period of six years, but only to a much less time, to wit, to the period of one year and four months.—Verification.

Each. of Pleas,
1838.

RHODES
v.
SMITHURST

Rejoinder, that the causes of action in the first count mentioned did not accrue to the plaintiff within six years next before the death of the said James Hobson, in man-

Book of Pleas;
1838.



RHODES
v.
SMETHURST.

ner and form as in the replication alleged ; on which issue was joined.

The cause was tried before *Park, J.*, at the last Warwick assizes, and a verdict found for the plaintiff. A rule having been subsequently obtained to enter a verdict for the defendant, or to arrest the judgment on the first count, on the ground that the replication was no answer to the plea, the case, at the suggestion of the Court, and with the consent of the parties, was set down in the special paper for argument, and was now argued by

Sir *W. Follett* for the plaintiff.—The uniform result of the cases decided on the Statute of Limitations is, that it shall not deprive the plaintiff of his remedy against his debtor, unless he have been guilty of the *laches or default* contemplated in the statute. The statute 21 Jac. 1, c. 16, contains, in s. 7, express exceptions of certain cases where actions *might* be commenced, viz. the cases of plaintiffs who are infants, femmes covert, non compotes, &c., at the time of the accruing of the cause of action. But here the plaintiff *could not* sue any person until after probate was taken out to the debtor's estate. There is no provision in the act giving executors plaintiffs any extension of the time, yet the courts have extended the words of the act, by an equitable construction, in their favour, giving them a reasonable period after probate in which to proceed with an action. In *Cary v. Stephenson (a)*, where C. was indebted to A., who died, and B. received the money, and afterwards the plaintiff's wife took out administration to A., and within six years after the grant of administration, but not within six years after the receipt of the money, the plaintiff sued B. for money had and received ; it was held that the Statute of Limitations could be no bar to the action, because the plaintiff's title com-

(a) 2 Salk. 421 ; S. C. Carth. 335 ; Skin. 555 ; 4 Mod. 372.

menced by taking out the letters of administration. That case is not, indeed, directly in point, because the money was not received by the defendant till after the death of the intestate; but the Court says the statute does not apply, proceeding on the ground that there was no laches on the part of the plaintiff. [*Alderson, B.*—There was there no cause of action until an administrator was appointed, when the money became money received to his use.] In *Wilcocks v. Huggins* (a), which was an action on a promissory note dated July, 1719, by the executor of the executrix of G. W., the defendant pleaded that the action did not accrue within six years; the plaintiff replied, that the first executrix, in Trin. 11 Geo. 1 (1725), sued out a bill of Middlesex against the defendant, returnable in the following Michaelmas Term, on which there was a continuance by non misit breve, and an alias taken out, returnable in Hilary Term following, before which the executrix died, and made the plaintiff her executor, who, in Michaelmas Term, 3 Geo. 2, sued out a latitat against the defendant, on which he declared; concluding with an averment that the cause of action accrued within six years before suing out the first bill of Middlesex. There no reason whatever was shewn for the delay of the four years between the first and the last writ: and therefore the Court held the replication bad by reason of that unnecessary delay, saying “that the most that had ever been allowed was a year, and that *within the equity* of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; but they would not go a moment further, for it would let in all the inconveniences which the statute was made to avoid.” And they added—“If, indeed, the second executor had been retarded by suits about the will or administration, and he had shewn that

Book of Pleas,
1838.

RHODES
v.
SMETHURST.

(a) 2 Stra. 907; Fitzg. 170, 289.

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

in pleading, it would have been otherwise, because then the neglect would have been accounted for." If, therefore, it be shewn in pleading that there has been no default or laches, the statute does not apply. It was, however, erroneously stated in that case that the longest time that had ever been allowed to an executor was a year: in *Lethbridge v. Chapman* (a), there was an interval of fourteen months, yet the action was held in time. Other cases of the same class are collected in Comyns' Digest, Temps, G. 17.

There are, however, other authorities bearing more directly upon the point which arises in the present case—the application of the statute where there is, for a part of the six years, a want of any party to be sued. In *Hall v. Wybourn* (b), to assumpsit for goods sold, the defendant pleaded non assumpsit infra sex annos. The plaintiff replied, that the defendant, at the time of the promise in the declaration mentioned, was resident in parts beyond the seas, and out of the allegiance of the king and queen, and there continued until &c., on which day, and not before, he voluntarily returned into this realm; and that the plaintiff's bill was exhibited against him within a year after his return. It was held, on demurrer, that the replication was ill, on the ground that the plaintiff had neglected his proper remedy, by not filing an original and prosecuting the defendant to outlawry, which, though it should be reversed on his return, yet the plaintiff might then have brought another original by journeys' accounts, and thereby taken advantage of his first writ. The Court thereal so, therefore, decided against the plaintiff solely on the ground that he had been guilty of laches, because he might have commenced his action sooner. Here the plaintiff had no mode of doing so. Suppose a promissory

(a) Cited, Fitzg. 171, 289.

(b) Carth. 136; S. C. 3 Mod. 311; 2 Salk. 420; 1 Show. 98.

note were given, payable on the 5th of November, and the maker died on the 6th, according to the case on the other side, if the party entitled to administration neglected to take it out for six years, the plaintiff would be barred of his remedy. *Joliffe v. Pitt* (a) is an authority strongly in favour of the view now contended for. There the plaintiff had lent W. a sum of money on a note dated in August, 1689, with interest at 1*l.* per cent per month. W., then residing beyond seas, paid two years' interest, but then failed, and went to the East Indies, where he died in February, 1706, having in the interval acquired considerable property, and made a will appointing the defendant Pitt his executor. In April 1702, the plaintiff sued out a writ against W., which was continued on the roll till 1706. In October 1710, the defendant Pitt came over to England, and proved the will. In May 1714, the plaintiff filed his bill against him and other creditors of W., for whom it was insisted that the plaintiff was barred by the Statute of Limitations. It is said to have been agreed that the plaintiff being abroad till 1702, and then suing out his writ, with continuances until the debtor's death, all that time was well excused; and also until his will was proved and there was an executor, since laches could not be attributed to the plaintiff for not suing, while there was no executor against whom he could bring his action; the only objection made on the defendant's part being, that the plaintiff ought to have revived the former action at law, and not have filed a bill in equity. The Lord Chancellor Cowper held that the statute did not apply, and decided in favour of the plaintiff. The cases in which it has been decided that when the statute has once begun to run, it goes on running, will be found all to have been cases in which the plaintiff could have proceeded with the action. [*Alderson, B.*—There are cases in which

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

(a) 2 Vern. 694.

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

the plaintiff could not have even known that the right of action had accrued—as of trespass under ground—yet the statute has been held to run against him. So where the breach of a contract has occurred more than six years before, although the special damage accrued within the six years, the statute has been held to be a bar; *Battley v. Falconer* (a). There are some instances of peculiar hardship of that class. So in the case of negligence or misfeasance by an attorney, where it is not discovered within the six years (b).] Those are cases where there is only the want of knowledge of some *fact*, not where the party is precluded from suing by *law*: Here the plaintiff knows the facts, and is desirous to proceed with his action, but the law prevents him. How, then, can he be said to have been guilty of laches—which is the test applied, in *Joliffe v. Pitt*, to the construction of the statute? [*Alderson, B.*—Is there not laches for one year, between the time when the action first accrued, and the death of the testator?] No; the legislature gives the creditor six years in which to sue, and he cannot be guilty of any laches during the progress of that time. In *Wilcocks v. Huggins*, the original testator died without having commenced any action, and the six years had all but expired when the executrix sued out the first writ. In *Murray v. East India Company* (c), where it was held that, in an action by an administrator on a bill of exchange payable to the intestate, but accepted after his death, the statute did not begin to run until administration granted, *Abbott, C. J.*, says:—"It cannot be said that a cause of action exists, unless there be also a person in existence capable of suing." That cannot mean a person who is capable of suing for a single day, but a person who is

(a) 3 B. & Ald. 288.

(b) See *Granger v. George*, 5 B. & Cr. 149, 7 D. & R. 729; *Short v. M'Carthy*, 3 B. & Ald.

626; *Howell v. Young*, 8 D. & R. 14, 5 B. & Cr. 259.

(c) 5 B. & Ald. 204.

capable of suing during the period of limitation. In *Skeffington v. Whitehurst* (a), a similar opinion was expressed by *Alderson, B.* In *Webster v. Webster* (b), a plea of the statute was allowed, only because Lord *Eldon* held the fair construction of the allegations in the bill to be, that the defendant had possessed himself of the personal estate of the debtor (in whose lifetime the debt had accrued), and might therefore have been sued within six years of the death, as executor de son tort. There the plaintiff clearly might have sued the testator himself. In *Perry v. Jenkins* (c), where a suit for an account of rents had become abated by the plaintiff's death before decree, and his administrator more than six years afterwards filed a bill of revivor, to which the defendant pleaded the statute of limitations, but did not state in his plea that six years had elapsed since the replication taken out to the original plaintiff, the plea was overruled. That could only be on the ground that there is no cause of action continuing, unless there is some person in esse capable of taking advantage of it on the one side, or against whom it can be taken advantage of on the other. *Douglas v. Forrest* (d) is still more directly in point. There it was held, that where the testator resided and died abroad, his executor in England might be sued at any time within six years after his taking out probate. In that case the plaintiff might, had he chosen, have sued the testator while he was abroad. The decision can be supported only in this way, that the plaintiff was guilty of no laches or default in not suing while his debtor was beyond seas. [*Alderson, B.*—That was in truth a case not within the statute at all, because the debtor never returned from beyond seas; therefore the plaintiff might have sued *him* at any time during his life; and so might sue his executor at any time during six years

Reck. of Pleas,
1838.

RHODES
v.
SMITHURST.

(a) 3 Y. & Col. 34.

(b) 10 Ves. 93.

(c) 1 Myl. & C. 114.

(d) 4 Bing. 686; 1 M. & P. 663.

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

after he was appointed executor.] The *cause of action* mentioned in the statute of James, means the cause of action against the party originally liable: the action must therefore have been brought against the testator within the six years, unless there were something in the statute of Anne which gave a larger right. Then, if the original debtor never returns from beyond seas, what term has the creditor against his executor? It cannot be more than six years from his death. The statute of Anne only gives a new right of proceeding against the debtor if he returns, but gives no new cause of action against his representative. But if the cause of action be held to have accrued from the time of probate granted, it must be so held in every case:—but the title by probate, again, refers back to the death. *Douglas v. Forrest*, therefore, can stand only on the ground that there was *no laches* until an executor was appointed. *Best, C. J.*, says—“Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue.” The right construction, therefore, of the statute, and the effect of the cases, is this: that the right of suing is not barred unless there have been six years of laches or default on the part of the plaintiff. Here he has been guilty of none.

Sir F. Pollock, for the defendant.—The defendant is entitled to the judgment of the Court. The language and meaning of the statute of James are perfectly plain, and the clear construction of it is, that having once begun to run, it continues to run, and its operation is not saved by any such distinctions as have been relied upon on the other side. The argument for the plaintiff must go to this length—that there must be, during the whole six years, a continuing cause of action, a plaintiff capable of suing, and a defendant capable of being sued; and that if there be any interruption, in any one of these respects,

for however short a time, that time must be taken out of the calculation: whence it will follow, that in every case of a personal representative, whether suing or sued, there must be a special inquiry as to the state of the debt at the time of the death of the original debtor, and at the time of the grant of probate or administration. So to decide would be legislating, not expounding the existing law. If every interruption of the power to sue suspends the running of the statute, then the long vacation—the Sundays and close holidays—during which a plaintiff cannot effectually commence an action, ought to be taken out of the computation. Or suppose a plaintiff were a close prisoner abroad during part of the time, so that he could not send over a power of attorney to commence the action, would the operation of the statute be suspended till his liberation? The disability in this case, moreover, is altogether of the plaintiff's own causing; he created the delay by putting forward his unfounded claim to probate. In *Doe d. Duroure v. Jones* (a), it was held, that when once the five years allowed to an infant to make an entry for the purpose of avoiding a fine, have begun, the time continues to run notwithstanding any subsequent disability; and *Ashhurst, J.*, there says: “If the disability be once removed, the time must continue to run notwithstanding any subsequent disability *either voluntary or involuntary*; and even if there were any distinction between the two kinds of disability, the present is against the plaintiff, for the imprisonment for debt was in consequence of his own voluntary act.” Lord *Kenyon, C. J.*, in the same case says:—“I never heard it doubted, till the discussion of this case, whether, when any of the statutes of limitation had begun to run, a subsequent disability would stop their running.” His lordship states that to be the uniform construction of the statutes, and the generally received

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

(a) 4 T. R. 300.

Exch. of Pleas,
1838.

RHODES
SMETHURST.

opinion of the profession. There are indeed cases where the Courts have refined for the purpose of holding that the statute has not *begun* to run, but none which break in on the principle thus stated by Lord *Kenyon*. The statute of the 21 Jac. 1, c. 16, itself, says nothing whatever about *defendants*, excepting in the clause giving a year after the reversal of an outlawry. The first case in which the construction of it came in question was *Prideaux v. Webber* (a), where it was held that a plea of the statute was a bar, notwithstanding a replication that when the cause of action accrued, rebels had usurped the government, and none of the King's Courts were open: for there was no exception in the act of such a case. If the argument on the other side be well founded, it might equally have been said in that case, that a period when no Courts were sitting, was *ex necessitate* excepted out of the statute. At the time of the Revolution, again, there was an interval during which the Courts were not sitting; and an act of Parliament, the 1 Will. & M., c. 4, was passed expressly to provide for the case; enacting that the time between the 10th of December, 1688, and the 12th of March following (a period of ninety-two days), should not be reckoned in *quare impedit* or the Statute of Limitations. If this time would have been left out of the computation on the true construction of the statute of James, no legislative provision of the kind would have been necessary. The next statute which passed relating to the subject was that of the 4 Anne, c. 16, prior to which there had been decisions on the statute of James, holding the exception in section 7 to apply only to the case of *plaintiffs* absent beyond seas (b). Now it is conceded on the other side, that the right to sue the debtor on his return from beyond seas, includes the right to sue his executors; but they are not

(a) 1 Lev. 31.

(b) *Hall v. Wyburn*, Carth. 136; *Chevely v. Bond*, id. 226.

mentioned in the statute of Anne. *Murray v. East India Company*, and *Cary v. Stevenson*, only prove that no cause of action, within the meaning of the statute, accrues, until there is some body capable of suing, and somebody capable of being sued: but if the argument on the other side be correct, the distinction taken in those cases, that the instruments were not suable on at all till after the death, was unnecessary, and the fact on which the Court decided was altogether immaterial. In both those cases the original cause of action was against the executor. *Joliffe v. Pitt*, if properly examined, contains nothing to shew that the operation of the statute can be stopped when it has once begun to run. There all the parties were abroad; the plaintiff till 1702, the debtor until his death; and the statute of Anne passed in 1705, before the plaintiff was barred by lapse of time: and being in the present tense, ("if any person, &c., be or shall be beyond the seas, &c.") it had the same operation on the case as if it had passed before the cause of action accrued. And the Lord Chancellor merely said that "he inclined to think that the statute should not take place." Again, it is said that *Perry v. Jenkins* has carried the doctrine in *Murray v. East India Company* to a further extent. It is to be observed, that it would be dangerous to take the decisions in equity on this subject as certain guides in a Court of law. The Courts of equity are not bound by the statute, although they decide in analogy to it; but they look only to the equitable part of the statute, and refuse to enforce it in cases of fraud, or even of mistake. In *Perry v. Jenkins*, it did not appear on the plea that there was any representative who could have sued earlier, and the case therefore fell within the authority of *Murray v. East India Company*: but the judgment of the Court may also be rested on the ground that a bill of revivor is not a new suit. *Webster v. Webster* is no authority whatever for

Each. of Pleas,
1838.

RHODES
v.
SMETHURST.

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

the plaintiff; the plea of the statute was there held good. The case of *Wilcocks v. Huggins* has been questioned in later cases; but there also the judgment was in favour of the defendant. No *decision* is to be found in which the running of the statute has been held to be *stopped* by reason of a disability in the defendant. *Douglas v. L'orrest* is in principle precisely the same case as *Jociffe v. Pitt*: the decision proceeded on this principle, that personal representatives are liable, not under the words of the statute, but under some construction of law put upon it by the Courts. If, therefore, a plaintiff is desirous to take his case out of the operation of the statute, he either must shew that it has not begun to run, or must bring himself within some of the exceptions contained in the statute itself, or established by judicial construction. Here he does none of these, and therefore falls within the general and established rule of law, that the statute, having once begun to run, runs on notwithstanding any subsequent disability.

Sir *W. Follett* in reply.—The distinction taken for the plaintiff is between the case of a party who has a right *by law* to sue, but is under a disability from other causes, and a party who *by law* cannot sue. *Doe d. Duroure v. Jones* turned altogether on the excepting words in the Statute of Fines, 4 Hen. 7, c. 24, that persons within age of twenty-one years &c. *at the time of* the fine levied, shall have five years after the ceasing of the disability. Here the plaintiff does not profess to rest his case on section 7 (the excepting clause) of the Statute of James, but contends that his case is not within section 3, the enacting clause. He does not allege that in order to prevent the operation of the statute, it must be a cause of action which the plaintiff has the *power* to enforce during the six years, but one which he had not the *legal right* to enforce against

any party. The argument as to the Sundays and holidays, &c. amounts to nothing; the legislature legislates with reference to the usual practice of the courts of law: it might as well be argued that the nights ought not to be counted. As to the statute of 1 Will. & Mar. c. 4, it cannot be supposed that the legislature would have deemed it necessary to provide for such a special case, and yet allow this evil, of continual occurrence, to pass without remedy, unless it was considered that the Statute of Limitations did not apply at all to such a case. It was held that the ninety-two days were to be taken out of the six years whenever they occurred: *Snodde v. Ward* (a). That was, therefore, a strong legislative declaration that the former statute meant that the plaintiff should have six full years unless he were guilty of laches. It is said that the delay here is the act of the plaintiff; if so, that ought to have been replied. *Wilcocks v. Huggins*, and *Cary v. Stephenson*, were only cited as shewing that the Courts have proceeded on an equitable view of the intention of the legislature, not on the express words of the statute. As to *Joliffe v. Pitt*, it is true there was no express judgment on this point, but it is said to have been *agreed*; and there could be no excuse for the not suing earlier, except there being no executor to be sued. In *Douglas v. Forrest*, the case is taken as an authority. It is said that in *Murray v. East India Company*, the Court proceeded on another ground; but in truth it became necessary there to decide the very point: there was no special replication setting out the facts of the grant of administration, &c.; the only question for the Court therefore was, when did the cause of action accrue; and it was necessary to decide that point.

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

LORD ABINGER, C. B.—This case has been argued with great ingenuity, and if we had felt any reasonable doubt

(a) 3 Lev. 283; 2 Ventr. 185, 197.

Book of Pleas,
1832.

RHODES.

ⁱⁿ
SHERBURN.

about it, we should have wished to take further time to consider before pronouncing our judgment. It appears to me that the question is by no means new, and that, so far from its being a case, as Sir *William Follett* says, which never occurred before, I think it might be found that although this precise point may not have arisen, a hundred cases of a similar nature have occurred. The case is this:—A party who is a debtor, and against whom a cause of action existed in 1829, dies in 1830, his creditor being then alive. After his death, some litigation takes place before the will is proved; and the whole period between the year 1829, when the debt accrued, and the time when the creditor brings his action, embraces considerably more than six years. Now the proposition contended for is this—that, although the debt accrued against a debtor who might have been sued, and in favour of a creditor who might sue, yet, as there is a portion of the time that has elapsed, the lapse of which was caused by the litigation as to who should be the executor of the debtor, that portion ought not to be calculated as a part of the six years. I believe it never happens that the death of a man who has any thing at all to leave is not followed by some little delay: it frequently happens, where a will is contested, that some considerable time elapses before probate is given, or, if the will is considered as inoperative, or as not being the will of the testator, before administration is granted; and it never occurred in my practice, that upon a plea of non assumpsit infra sex annos, it should be stated that you ought to deduct that portion of time which had run between the testator's death and the taking out probate or letters of administration. I believe that cases where such an interval has taken place have frequently occurred, and where that interval has formed part of the statute's continuing to run, and I never heard the objection made before. It is put on this ground: the meaning of the 3rd section of the Statute of Limitations, it is said,

is this—the action should not only have accrued six years, but there should have been a continuing cause of action, with a plaintiff capable of suing, and a defendant capable of being sued, the whole time. Now again, although this precise point may never have occurred, yet cases have arisen frequently, in actions both by and against executors, where for a portion of the time there was no such capacity of suing, and yet I never heard of such a portion of time being subtracted from the six years. It appears to me that the general interpretation of the statute has been this: that where an action has once accrued, and the statute has begun to run, there being then a capacity of suing and of being sued, the statute continues to run. And Sir *William Follett* admits that he has no case at common law to shew as a warrant for the exception he contends for, but he says there are cases in equity. Now the first observation to be made is this, that cases in equity so often depend on a great variety of circumstances, that they cannot necessarily be taken to give a Court of law authority, when they are cited to contravene the course of common law. True it is, Courts of equity admit the Statute of Limitations, by following and applying it where it can be done without any prejudice to equity, but there are cases where they see manifest injustice would be done by applying it, and therefore refuse to do so. Whether in *Joliffe v. Pitt* the Court founded its judgment on that ground or not, I do not pretend to say: it certainly was a very extraordinary case. At the time the debt accrued both the plaintiff and the defendant were abroad; the plaintiff returned in the year 1702, and then sued out a writ, and he continued suing—the words are, “continued on the roll”—for four years. The debtor subsequently died abroad, and in the mean time (1705) the statute of Anne was passed. But Sir *W. Follett* says it could not apply, because the debt had accrued before it passed. I am by no means certain that the Court of

Book of Pleas,
1838.

RHODES
S. SMITHURST.

Exch. of Pleas,
1833.

RHODES
v.
SMETHURST.

Equity would not reasonably have considered, that as the legislature had deemed the case of a debtor abroad a proper exception out of the act of Parliament, they would not apply the same rule as would otherwise have prevailed. In 1710 there was a personal representative then in England who proved the will, and the action was brought within four years after that time; and the Court held that the creditor could sue him after the time of taking out the probate. But that case presents a distinction which is not to be found in this, namely, that there the party had commenced his action against the debtor, and had proceeded in keeping it alive until his death. There are several cases that have been cited to shew that where a party was capable of suing, and had commenced an action against a party capable of being sued, any interruption of the suit by circumstances which he could not control, should not prevent him or his representatives from reviving it again, so as to take away the application of the statute. Now, whether these are cases founded upon an equitable construction of the statute, though not precisely within the words, we need not inquire in order to decide this case, for here that qualification does not exist. During the period of a year and more, while the debtor was living, and when it is admitted there was a power to bring the action, no action was brought, and a year and a quarter expires of the first part of the time, which cannot be shut out of the account. The case of *Murray v. The East India Company* stands on a distinct ground, and one which must be at once acceded to. In that case Mr. Hope had dispatched some bills to an agent in England, and himself embarked in a vessel for England; the vessel was lost, and he perished with it. His agent in England, acting under a power of attorney given by Mr. Hope before he died, presented the bills to the East India Company, and they were paid to the agent. It turned out that the agent had exceeded his authority in indorsing

the bills; and it was held that the East India Company could not defend themselves against another action on the bills by the administrator of Mr. Hope, on the ground that more than six years had elapsed since the date of the bills, because the right of action did not exist in the lifetime of Mr. Hope, therefore there was no power of bringing an action until administration was taken out: the action never accrued to any body until the letters of administration were granted; from that time, therefore, according to the words of the statute, the statute began to run. This case is very different also from those in which the plaintiff has commenced his suit, and where by his death it has been interrupted, and his executor has commenced a new suit; it has been held under those circumstances, by analogy to the remedy the statute has provided in the case a judgment reversed, that the party may commence a new action, and he has a year to do it in. That is a class of cases where the suit had been once commenced; the other class of cases is where no action has accrued at all, there being no power to sue or be sued, till the period when the party has taken out representation. In this case there was a power to sue and be sued for a year and more before the testator's death—the statute had begun to run at that period,—there being the two parties in esse to play the part both of plaintiff and defendant. Then if it began at that time, what was to stop it? Sir *William Follett* admits that he does not know of any case at law, wherein, after the statute had begun to run between parties that are competent as plaintiff and defendant, the Court has held that the lapse of six years from the time when the action first accrued should not operate as a bar to the suit, by reason of any interruption during the time, when no person was in esse. And his argument would amount to this, that if the statute has run for five years, and the party then dies, and his will is contested for several years, the statute does not run on until after all that period, in order to complete the six years.

Exch. of Pleas,
1838.

RHODES
&
SMETHURST.

Each. of Pleas,
1838.

RHODES
v.
SMITHURST.

That is a sort of computation I have never heard of. Neither can I agree with what has been said in answer to the argument drawn from the statute of 1 W. & M. c. 4. The argument is this, that the legislature never foresaw such a case, and passed this act of Parliament to remedy the inconvenience resulting from it, enacting that the Statute of Limitations should not apply during the period of ninety-two days. Sir *William Follett's* answer is, that inasmuch as the cases of interruption to actions by death or the want of a representative must so frequently arise, the legislature not providing for those cases by any clause in this statute, it may be inferred that the Statute of Limitations would not apply to them at all. One would rather say, the legislature *has* foreseen those cases, and did not think it was necessary to make any provision for them, but meant the statute to run from the time the cause of action first accrued. But even in that peculiar case, which could not be foreseen, it is plain the legislature thought the disability of suing or being sued during the space of ninety-two days would require some provision, and they passed a legislative enactment to prevent that period from being reckoned as part of the time, during which there was a suspension of all ability of proceeding at law, the whole of a term having passed without any sitting of the Courts of justice. Therefore the legislature, as it appears to me, has by its own enactment shewn in what cases the period of time in which there existed any disability in the plaintiff or defendant not being able to sue or be sued, should or should not form part of the six years limited by the statute. We have therefore, as I think, both authority and reason for concluding that the period of time from which the computation is to begin, is when the action accrued; and that when the statute has once begun to run, any portion of time in which the parties are under disabilities must nevertheless form part of the six years. There is no doubt, whichever way we

decide a question not provided for by the legislature, the imagination may suggest cases of considerable hardship ; but a Court of law ought not to be influenced or governed by any notions of hardship ; they may require legislative interference, but we cannot modify the rules of law. For these reasons, I think the judgment should be arrested on the first count in the declaration.

East. of Pleas,
1828.

RHODES
v.
SMITHURST.

BOLLAND, B.—This case has been exceedingly well argued, and I have paid great attention to the arguments on both sides. I confess, for a considerable portion of the time during the progress of the argument, I had great doubt whether or not the opinion I should adopt would be in conformity with that of the rest of the Court. However, the general understanding of the profession having been as my Lord has stated, and no case being adduced to the contrary, I concur, though not without some doubt, in the opinion that the plaintiff is barred by lapse of time.

ALDERSON, B.—I am of the same opinion. It appears to me that if the statute begins to run it must continue to run—that is to say, as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued in England, from that time the date of six years begins to run : and unless that were so, great inconvenience would follow ; for it would be very difficult, in almost every case, to ascertain whether the statute had or had not run, and we should be obliged to take a great many documents and statements, a great many beginnings and endings, and should have to add up those precise periods of time, out of which the six years would have to be made out ; so that great inconvenience would result : and therefore it is better to apply the law as it at present stands ; it being far better that a particular injury should be inflicted on one individual, than that great inconvenience should be applied to all the community. The question here is, what

Each. of Pleas,
1838.

RHODES
v.
SMETHURST.

is the true construction of the Statute of Limitations itself?

Cases have been cited which seem to me not to be applicable to the present. It is true they are authority as far as this,—that the Courts have put an equitable construction on the statute; but they are not applicable to induce us to extend it to this case. The Courts seem to have considered that where the suit had once been commenced by the party who had a right so to commence it, from that moment the Statute of Limitations ran, as far as the law was concerned, unless he was prevented by the act of God, or from the proceeding being set aside from some deficiency of pleading; and there is a limited period of time given in which the suit may be recommenced in such cases: and the Courts seem to consider it as virtually and equitably a continuation of the first. But early in the course of the argument, I requested Sir *William Follett* to point out any case in which the running of the statute was stopped under circumstances similar to the present; where no suit had been commenced by the party who ought to have commenced it. No such case has been pointed out in the course of the argument; the cases that have been before the Court are these—such as where a party dies, and his executor or administrator has a limited time within which to administer his estate, and it is insufficient for the purpose, if there be no laches on the part of the executor or administrator, the Courts will give a larger period of time; and so, if the time be consumed in litigation as to who should be appointed representative, this larger period might be and has been allowed in some cases. So again, in cases of removal from an inferior court, whereby the party is prevented from going on; the law says, if he continue his suit within a reasonable and proper time, it shall be considered as virtually dating from the commencement of the original suit in the inferior court. So again, where a woman marries, having commenced

her suit within the proper period of time, marriage being a lawful act, if she commences a suit in the name of husband and wife, and if that suit be promptly commenced, the Courts hold it a continuation of the first. I do not say whether this is founded on sound and true principles, but it proceeds on an equitable construction of the case put in the statute as to the reversal of outlawry. *Joliffe v. Pitt* and *Douglas v. Forrest* are the two cases mainly relied on by Sir William Follett. In *Joliffe v. Pitt*, it seems to me the statute of Anne did apply at law; and the rule in equity being, that although the Statutes of Limitations do not bind the courts of equity, yet they are admitted as a guide in cases analogous, the Chancellor probably proceeded on an equitable application of the statute of Anne, which had then passed. He adopted the Statute of Limitations, uniting therewith the statute of Anne as the guide of his discretion as to the question of laches. *Douglas v. Forrest* was the same case at law after the statute; the statute had never begun to run against the plaintiff, until probate was taken out to the testator. In *Murray v. The East India Company*, the cause of action accrued after the death of the intestate, and, until the personal representative was appointed, there was nobody who could sue at all. And so in *Cary v. Stevenson*, there was for some time nobody who could be sued at all; but the six years after a representative appeared, and there was a complete commencement of a right on the part of the plaintiff against a defendant,—the one capable of suing in England, the other capable of being sued,—was the period of limitation. In this case there was a complete right of action existing in the testator's lifetime, and a person who could be sued, and in England, and there was a long period of time during which an action might have been commenced by the present plaintiff against the testator: then the statute dated from that period. Sir William Follett very in-

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

Exch. of Pleas,
1838.

RHODES
v.
SMETHURST.

geniously put the possible case of an action accruing on one day, and the party dying on the next. This is an extreme case, and there may be extreme cases the other way. The legislature has not provided for them; and I do not know that it ought, for the probability is that they never will occur in practice at all. However, we must decide on the provisions of the statute, without reference to extreme cases either way. For these reasons I think the plea is good, and that the judgment, as to the count to which it is pleaded, ought to be arrested.

GURNEY, B.—I entirely concur in the judgment given by the other members of the Court, and in the reasons given for it.

Rule absolute to arrest the judgment on the first count.



EDMUNDS *v.* CATES.

Notice of taxation given before 9 o'clock P. M. of one day for the day following at 12, is "one day's notice," within the meaning of the rule of T. T. 1 Will. 4, s. 12.

KNOWLES moved to set aside the taxation of costs, on the ground that twenty-four hours' notice of taxation had not been given. The notice was delivered on Friday, at half-past 8 in the evening, for twelve the next day. The rule of T. T. 1 Will. 4, s. 12, requires "that before taxation of costs *one day's notice* shall be given to the opposite party. He contended that this was not "one day's notice" within the meaning of that rule.

PER CURIAM.—A notice given any time before 9 o'clock in the evening of one day for the following day is sufficient.

Rule refused.

Exch. of Pleas,
1838.

WICKENS v. COX.

F. V. LEE had obtained a rule to set aside a judgment of non pros., which had been signed for want of a declaration. The defendant had obtained and served an order for particulars (which operated as a stay of proceedings), and afterwards, but before any particulars were delivered, served a demand of declaration, at the bottom of which was a notice that he abandoned his order for particulars. No declaration having been delivered, the defendant signed judgment of non pros.

Where an order for particulars was obtained and served, and the defendant afterwards, and before any particulars were delivered, served a demand of declaration, at the bottom of which was a notice that he had abandoned his order for particulars:—*Held*, that this was irregular, and that he ought to have got rid of the order for particulars before the demand of declaration; and the Court set aside a judgment of non pros. which had been signed for want of a declaration.

Cowling shewed cause.—A party who obtains and serves a judge's order may abandon it if he chooses, upon giving notice to the other party that he intends to do so. There is no authority expressly in point, but the general rule is that even a rule of Court may be abandoned unless the other party has acted upon it. In *Macdougall v. Nicholls* (a), it was held, that when, upon a summons attended at Chambers, the Judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such minute or not: and the language of the Judges in that case is wide enough to comprehend every case. [*Parke, B.*—In that case the order had not been served, and until then there is a *locus penitentiæ*. But this is an order which is absolute at the time, for a stay of proceedings, and the question is whether it can be got rid of without an instrument of equal force and authority.] How is this order to be got rid of? The plaintiff may use it as a pretext for not proceeding in the action, and in *Kirby v. Snowden* (b), the Court, in such a case, refused

(a) 3 Ad. & Ell. 813; 5 Nev. & Man. 366. (b) 4 Dowl. P. C. 191.

Exch. of Pleas,
1838.

WICKENS
v.
COX.

an application to compel him to go on with the action, or to enter a *stet processus*. [*Parke, B.*—The defendant might get rid of the order by obtaining a summons and a Judge's order. *Alderson, B.*—A Judge would perhaps, if necessary, make such an order *ex parte*.]

Lee, in support of the rule.—It is unimportant to consider whether the order might be abandoned or not in the way suggested on the other side, for here the abandonment was altogether a nullity, the notice not having been given prior to the demand of declaration, but contemporaneously with, or rather subsequent to it, as it was written at the foot of the same paper.

PARKE, B.—This was clearly irregular. The order for particulars should have been disposed of before the demand of declaration was given.

BOLLAND, B., ALDERSON, B., and GURNEY, B., concurred.

Rule absolute.

DOE *d.* COUSINS and Others *v.* ROE.

An affidavit of service of a declaration in ejectment, where the declaration is on several demises, is wrongly entitled "Doe on the demise of C. *v.* Roe," without mentioning the others.

THE affidavit of service of the declaration in ejectment in this case, was entitled "*Doe d. Cousins v. Roe*." The declaration was upon several demises. *Corrie* moved for judgment against the casual ejector, and urged that the title of the affidavit was sufficient, as the plaintiff in such an action was John Doe, and the lessors were not parties. In *Doe d. Jenks v. Roe (a)*, where the lessors of the plaintiff were described in the declaration as executors, it was held that the affidavit of service need not, in stating the name of the cause, notice the character of the lessors.

(a) 2 Dowl. P. C. 55.

LORD ABINGER, C. B.—It will not do; you must amend your affidavit. *Exch. of Pleas, 1838.*

PARKE, B.—It is a misdescription of the action. It ought to have been “Doe on the several demises.”

Doe
d.
COUSINS
v.
ROE.

The other Barons concurred.

Rule refused.

COOKE and Another v. VAUGHAN.

MANSEL had obtained a rule to shew cause why the bail-bond should not be given up to be cancelled, and a common appearance entered, on the ground of variance between the *capias* on which the arrest had been made, and the copy; the *capias* describing the defendant by the addition of “gentleman,” and the copy omitting the addition altogether. He contended that the statute 2 W. 4, c. 39, s. 4, intended that an exact copy should be served on the party, and that although the form of writ given by that statute would be complied with without inserting the defendant’s addition, yet, that having been inserted, it became a material part of it, and should not have been omitted in the copy.

Where a writ of *capias* described the defendant by the addition of “gentleman,” but that addition was omitted in the copy served:—*Held*, that this was not a copy of the writ, in compliance with the stat. 2 Will. 4, c. 39, s. 4.

Wordsworth shewed cause.—The variance is immaterial: the addition of “gentleman” was merely surplusage, and might have been omitted altogether; and the Court will not set aside the proceedings for any trifling variance not affecting the sense or not calculated to mislead, where the copy is substantially correct: *Pocock v. Mason* (a), *Cooper v. Wheale* (b), *Sutton v. Burgess* (c). And it has been held expressly that in a writ of summons the addi-

(a) 1 Bing. N. C. 245.

(b) 4 Dowl. P. C. 221.

(c) 1 C. M. & R. 770.

Each. of Pleas, tion of the defendant need not be given. *Morris v.*
1838. *Smith (a).*

COOKE
v.
VAUGHAN.

PARKE, B.—In *Sutton v. Burgess*, the objection was not to the copy but to the indorsement upon it, which contained words not required by Rule II. Hil. T. 2 W. 4. I remember feeling considerable doubt whether the form prescribed by that rule was correct, and whether the very words there objected to should not have been contained in it. But the objection in the present case arises upon an alleged non-compliance with the statute, which requires a copy of the writ to be served, and I think this cannot be called a copy of the writ itself. The insertion of the word “gentleman,” though not required by the act, does not vitiate the writ, and the copy must contain all that the writ does.

ALDERSON, B.—The nearest case to this seems to be that of *Smith v. Pennell (b)*, where a writ was set aside for the omission of the word “London” in the indorsement. The addition cannot be rejected as surplusage, and it ought to be inserted in the copy. If it were otherwise, you might insert some other word in lieu of the word “gentleman,” and contend that it was still a copy.

PER CURIAM.—The rule must be absolute, but without costs, and on condition of the defendant undertaking to bring no action.

Rule absolute accordingly.

(a) 2 C. M. & R. 120.

(b) 2 Dowl. P. C. 654.

Exch. of Pleas,
1838.

CROWTHER v. ELWELL.

THIS cause was referred at Nisi Prius to arbitration, and the arbitrator awarded that the plaintiff was entitled to a verdict on the second and fourth issues, and the defendant on the first and third. The defendant, on the taxation, claimed to be allowed the costs of certain witnesses in respect of the issues found for him. The Master refused to allow such costs, without an affidavit of increase stating "that they were material and necessary witnesses in support of those issues, and that their evidence did not apply in any degree to the issues found for the plaintiff." The defendant produced an affidavit, which stated that, "although the evidence of those witnesses referred to a certain extent to the issues found for the plaintiff, yet that the said witnesses were subpoenaed by the defendant principally and *specifically* with a view to support the issues found for the defendant; and that such witnesses, in the judgment and belief of the deponent, spoke only generally and not materially to the issues found against the defendant." The Master not deeming this affidavit sufficient, refused to allow the defendant the costs of those witnesses.

Where some issues are found for the plaintiff, and some for the defendant, the latter will be entitled to the costs of the witnesses who are called exclusively in support of the issues found for him, but not of those who are also examined to disprove the issues found for the plaintiff.

F. V. Lee now moved for a rule to shew cause why the Master should not review his taxation.—The affidavit was sufficient, and the Master ought to have allowed the costs. In *Knight v. Moore* (a), it was held that the defendant is entitled to the costs of witnesses called to establish the issues eventually found for him, though they also gave evidence incidentally on the other parts of the case. The test seems to be, what is the issue to which the evidence of the witnesses is substantially directed. In *Eades v. Everatt* (b), it was held that the expences of a witness

(a) 3 Bing. N. C. 534; 4 Scott,
360.

(b) 3 Dowl. P. C. 637.

Exch. of Pleas,
1838.

CROWTHER
v.
ELWELL.

called by the defendant, whose evidence was substantially directed towards the issues found for him, were properly allowed to the defendant, although he gave some evidence upon the other issues. Here it is sworn that the witnesses were subpoenaed by the defendant principally and specifically to support the issues found for him, and that such witnesses spoke only generally and not materially to the issues found against the defendant. It is submitted that if a party swears he subpoenaed the witnesses to speak specifically to the issues found for him, although they did incidentally speak to the other issues found against him, he ought to be allowed the costs of those witnesses. Suppose, in this case, the second and fourth issues had not been raised upon the record, these witnesses must have been there to be examined on the other issues for the defendant.

ALDERSON, B.—If the witnesses were used to disprove the issues found for the plaintiff, the defendant cannot have the costs of those witnesses: if they were not used for that purpose, then the defendant would be entitled to have them allowed. I do not understand the meaning of the expression, that the witnesses were subpoenaed “specifically” with a view to the issues found for the defendant. If the word “solely” had been used, it would have been intelligible. The only definite rule is that laid down by *Bayley, B.*, in *Lardner v. Dick* (a), that where some issues are found for the plaintiff, and some for the defendant, the latter is not entitled to the expense of his own witnesses, unless their evidence related exclusively to the issues found for him. It seems to me that that is a definite rule. You are seeking to introduce an indefinite rule, which is to depend upon the intention of the parties in subpoenaing their witnesses.

Rule refused.

(a) 2 C. & M. 389; 2 Dowl. P. C. 333.

Exch. of Pleas,
1838.

COOPER
v.
WHITMARSH.

the 12th of May. The defendant was resident within forty miles of town. It appeared, however, from the sittings paper, that the 12th was only an adjournment day to the 16th. On the 14th the plaintiff gave notice of countermand.

R. V. Richards shewed cause, and submitted that the 16th being the real day of the sittings, the countermand was in time : but

PER CURIAM.—It is clearly too late, and the plaintiff must pay these costs.

Rule absolute.

DOE *d.* HOLDER and Another *v.* RUSHWORTH.

A notice under the 1 Geo. 4, c. 87, s. 1, requiring the tenant, "according to the statute, to appear in Court in Trinity Term next following," &c., is bad: it ought to require his appearance on the first day of the term.

Quære, whether a rule can be had under that statute, where the lease or agreement is unstamped at the time the motion is made?

MARTIN had obtained a rule calling upon the defendant, under the statute 1 Geo. 4, c. 87, s. 1, to shew cause why he should not enter into the recognizance, &c., required by that section. The notice served on the defendant, pursuant to the statute, required him, "according to the statute, to appear in Court in Trinity Term then next following, there to be made defendant," &c. &c. The agreement under which the premises occupied by the defendant were let, which was annexed to the affidavits in support of the rule, appeared to have been unstamped at the time the rule was granted, but to have been subsequently stamped. It was sworn also in the affidavits in opposition to the rule, that the premises were let by a tenant for life, who was dead, and that the lessors of the plaintiff were not the remainder men.

Platt and *Archbold* shewed cause.—First, this rule ought to be discharged, having been moved on the production of an unstamped agreement, which could not by

law be received in evidence for any purpose. The motion must, by the statute, be made on production of the lease or agreement. [*Alderson*, B.—Does not that mean that the Court must see it before they make the rule?] No—the landlord cannot move in the first instance without producing it; *Doe d. Caulfield v. Roe* (a). The words of the act are—“it shall be lawful for the landlord, producing the lease or agreement, &c., to move the Court for a rule to shew cause.”—Secondly, the motion was made too soon, the tenant having, by the terms of the notice, the whole of the present term to appear in. The non-appearance contemplated by the statute must be a non-appearance at the time prescribed by the notice. Lastly, the lessors of the plaintiff, being sworn not to be the parties entitled in remainder, cannot adopt this extraordinary remedy, which is given by the act only to landlords. [Lord *Abinger*, C. B.—We cannot try the title here; it is sufficient if it is a *prima facie* case within the act.] The statute only applies where the title is clear, and not where the defendant disputes it; *Doe d. Saunders v. Roe* (b).

Exch. of Pleas,
1838.

DOE
d.
HOLDER
v.
RUSHWORTH.

Martin, contra.—In *Doe d. Phillips v. Roe* (c), where a similar objection was made as to the stamp, the Court said, that if a stamp were requisite, they would enlarge the rule, and give the lessor of the plaintiff time to get the instrument stamped. [*Alderson*, B.—The difficulty is, the instrument cannot by law be used in evidence, so that there were no materials for granting the rule. If it came from the other side, the Court might give time for stamping it before shewing cause.] The motion was in time: the lessor of the plaintiff would have been entitled, on this notice, to move for judgment against the casual

(a) 3 Bing. N. C. 329.

(b) 1 Dowl. P. C. 4.

(c) 5 B. & Ald. 766.

Exch. of Pleas,
1838.

DOE
d.
HOLDER
v.
RUSHWORTH.

ejector in this term. The notice requires the tenant to appear *according to the statute*, and the proper construction is to refer it to the first day of the term, which is the time mentioned in the statute.

PER CURIAM.—The Master certifies, that if it were a town cause, the notice must require the tenant to appear on the first day of the next term, otherwise it would be bad; and the statute puts the notice in these cases on the same footing. This notice was therefore bad, and the rule must be discharged.

Rule discharged, without costs.

BROWN v. AHRENFELDT.

Where bail justify for property, which, though sufficient in amount, is not properly described in the affidavit of justification, the plaintiff is not entitled to the costs of opposition, but the bail will be admitted without payment of costs, and the costs of the opposition will be costs in the cause.

HUMFREY opposed bail in this case, and in the course of the examination it appeared that the property of one of the bail, although sufficient in amount, was not in the place where, in the affidavit of justification, it was described as being: and he contended that this defect in the affidavit entitled the plaintiff, under the rule of T. T. 1 Will. 4, s. 3, to the costs of opposition; and cited *Hemming v. Blake* (a). On the other side it was insisted that the only consequence was, that the plaintiff was excused from the costs of justification, and *Stevens v. Miller* (b) was referred to; and it was stated that that construction had lately been put upon the rule by the Court of Common Pleas.

PARKE, B.—Looking at the terms of the rule, which was made in case of bail, it would seem that the only effect is to excuse the plaintiff from the costs of justification. It

(a) 1 Dowl. P. C. 179.

(b) 2 M. & W. 368.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

by virtue of the statutes in that case made and provided, and that the said William Sewell being so chargeable as aforesaid, afterwards, to wit, at Westminster aforesaid, was *in due manner*, according to the form of the statute in such case made and provided, *assessed* as and for the said duties in a certain large sum of money, to wit, 40*l.* for the year ending on the 5th of April, 1835, whereof the said W. Sewell then and there had notice; and that afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, to wit, at Westminster aforesaid, a *certain warrant* for collecting and levying the said duties, was *in due manner*, according to the form of the statute in such case made and provided, made, issued out, and delivered to a certain collector of the said duties in and for the said parish. And the said Attorney-General further says, that the said sum of money, being the amount of the said duties assessed as aforesaid on the said William Sewell, has not been, nor could nor can be levied or collected under or by virtue of the said warrant, and that the same and every part thereof still remained and was due and in arrear and unpaid to his Majesty, and that the said William Sewell still owed the same and every part thereof to his Majesty, whereby an action hath accrued to his Majesty to demand and have of and from the said William Sewell the said sum of 40*l.*, part of the said sum of money above demanded.

The second count was the same as the first, except that the arrears sought to be recovered were for the year ending the 5th of April, 1836.

Plea, the general issue.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after Hilary Term, 1837, the parchment schedule of defaulters for assessed taxes for the parish of St. George, Hanover Square, made pursuant to the 49 Geo. 3, c. 99, s. 45, was produced from the Head Office of Stamps and Taxes at Somerset House, from which it ap-

peared that the defendant was a defaulter in the years 1834 and 1835, of the sum of 29*l.* 13*s.* 9*d.*, making together 59*l.* 7*s.* 6*d.*, and which was proved to be signed by the Commissioners of Taxes. It was contended on behalf of the Crown, that these schedules were conclusive evidence against the defendant of the sums mentioned therein being due to the Crown, it having been enacted by the 5 & 6 Will. 4, c. 20, s. 13, that such schedules should be "conclusive evidence against any person named therein as making default of payment, and against any parish &c. named therein as in default of the sum or sums mentioned in any such schedule, being due and owing and in arrear and unpaid to his Majesty, his heirs and successors, unless payment thereof shall be proved; and every such sum shall be recoverable from the person or persons making default of payment thereof, *as a debt upon record* to the King's Majesty, his heirs and successors, with full costs of suit and all charges attending the same."

Each. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

Price, for the defendant, contended that this being a *personal* information against the defendant, it could not be supported, since no information in personam could be founded on a matter of record, as this was declared to be by the 13th section of 5 & 6 Will. 4, c. 20: That the proper proceeding to bring that record before a jury would be by scire facias, which would give the party an opportunity of replying to the case, and putting a defence on the record, which, by this mode of proceeding, he was precluded from doing: That this record was already a judgment, on which no common personal information, in the nature of an action of debt on a simple judgment, could be founded. The Lord Chief Baron was inclined to think the objection valid; but a verdict was taken for the Crown for 59*l.* 7*s.* 6*d.*, subject to the opinion of the Court upon the objection taken, leave being given to the defendant to move to enter a verdict.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

In Easter Term, 1837, *Price* obtained a rule nisi accordingly; against which, in Trinity Term,

The *Solicitor-General* and *Amos* shewed cause. The question depends upon the construction to be given to certain acts relating to the assessed taxes, viz. the 43 Geo. 3, c. 99, the 43 Geo. 3, c. 161, and the 5 & 6 Will. 4, c. 20; and the question is, whether, upon this information, which is in the nature of a popular action of debt, the Crown can proceed to recover these arrears of assessed taxes; the objection on the part of the defendant being, that as the statute 5 & 6 Will. 4, c. 20, s. 13, has declared that it shall be recoverable as a debt of record, it can only be recovered by *scire facias*, or extent, or an information founded upon the record. [Lord *Abinger*, C. B.—Formerly the schedule, which you used in this case as conclusive evidence, was a record of the Exchequer, but, by the recent statute 5 & 6 Will. 4, c. 20, the schedule is to be carried to the Commissioners of Stamps and Taxes, and be deposited and remain in the Head Office of the Commissioners, and is a matter of record there; and the statute declares that the sum due from the defaulter, as stated in the schedule, shall be recoverable as a debt upon record.] Notwithstanding that enactment, it is submitted that it is quite optional on the part of the Crown, either to proceed upon it as a debt of record, or in the ordinary mode of recovering any other debt due to the Crown. The first act is the 43 Geo. 3, c. 99, which is still in force subject to very trifling alterations, and which gives directions how the commissioners are to proceed to recover the money due under the act. By the 9th section of that act, the commissioners for executing the act, (who are not the officers of the Crown,) are in the several parishes to issue their precepts to certain persons to be assessors, and then they are to meet on a certain day annually, and appoint persons as assessors, who are to

assess the different taxes upon the different individuals who are to pay them, and at the same time they are to return the names of two persons to be collectors. The 12th section provides that, on or before the 5th of June in every year, the assessors so appointed are to prepare and deliver to the commissioners certificates of assessments, which are to be signed by the commissioners, and the commissioners are to prepare and deliver three copies of the assessments, which are to be signed by them, and one of which they are to deliver to the collectors to be appointed by them, with warrants under their hands for collecting the same, upon which the collectors are to make demand of the sums charged upon the respective parties at their last places of abode; and upon payment to give acquittances, which shall be complete discharges. Then the 20th section provides that the Crown shall appoint certain officers, to be called surveyors and inspectors, who are to be checks upon the accuracy of what is done by the collectors. By the 24th section, power of appeal to the commissioners is given in cases of surcharge; and by the 29th section, their decision is declared to be final. The 33rd section gives the collectors a power of distraining on payment of the duties being refused, and, in certain cases, of imprisoning the parties. The 44th section provides, that the collectors are not to include any person in the schedule of defaulters to be returned into the Exchequer, except upon oath that the sum for which such person is returned in default is due and wholly unpaid. Then the 45th section, which is important, enacts, "that the collectors appointed as aforesaid shall make a due return, fairly written on paper under their hands, to such commissioners, containing the names, surnames, and places of abode, of every person within their respective collections, from whom such collector or collectors shall not have been able to collect or receive such duties for any of the causes before-mentioned, and

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

which shall have been duly verified on the oath of such collector as aforesaid, and the particular reason for returning each defaulter, and the sum and sums charged upon every such person; and such commissioners, after due examination thereof on the oaths or affirmations as aforesaid of the collectors, shall ascertain the sums which, according to the provisions of any of the said acts hereinbefore mentioned, shall have been discharged from assessment for any cause therein specifically allowed; and the said commissioners shall also make out their schedules containing the sums so discharged, and the sum with which each and every defaulter ought to be charged, and the sums which shall not have been collected by occasion of the collector's neglect, and which ought to be reassessed on the parish, ward, or place as aforesaid, and shall cause the said several particulars to be inserted in a schedule fairly written on parchment, under the hands and seals of such commissioners, or any two or more of them, containing the names and surnames of the said collectors, and cause the same to be delivered to the Receiver-General, to be returned by such Receiver-General into his Majesty's said Court of Exchequer, *whereupon every person so making default of payment, and each parish, ward, or place, so in default, may be charged by process of court, according to the course thereof in that behalf.*" Then came another act in the same year, the 43 Geo. 3, c. 161, the 23rd section of which, after providing that every assessment shall continue in force for one whole year, commencing the 5th of April, and that the duties shall be paid by quarterly instalments, and that it shall be lawful for the commissioners to issue and deliver to the collectors their warrants for the speedy and effectual levying and collecting the said duties, as the same shall become payable as aforesaid, enacts as follows: "and such part thereof as cannot be so levied and collected may be recoverable as a debt upon record to the King's Majesty, his heirs and successors, with full costs

of suit, and all charges attending the same ; and when so recovered, the said duties shall be paid to the Receiver-General in aid of the parish or place answerable for the same." Now, the course taken in the present case was in pursuance of, and in conformity to, the directions given in that act : the assessments were made out and delivered to the collectors to collect the sums assessed, and they collected what they could, and what they could not collect they put into a schedule of defaulters, which they returned to the commissioners, who made a copy of it and returned it to the Receiver-General, by whom it was transmitted to the Court of Exchequer. That continued to be the course of proceeding until the act of 5 & 6 Will. 4, c. 20, which provides that the schedules, instead of being returned by the Receiver-General into his Majesty's Court of Exchequer, shall be transmitted by him to the Commissioners of Stamps and Taxes, and deposited at their head office. The 13th section of that act, after reciting the latter part of the 45th section of the 43 Geo. 3, c. 99, (which provided that the schedules should be returned by the Receiver-General into the Court of Exchequer ;) and also reciting that it was expedient that such schedules should be deposited and remain with the said Commissioners of Stamps and Taxes at their head office, enacts, " That all such schedules as aforesaid, which shall be made out at any time after the commencement of this act, shall be delivered over or transmitted by the Receiver-General, Receiver-Inspector, or other receiver to whom the same shall have been delivered, to the Commissioners of Stamps and Taxes, and shall be deposited and remain in the head office of the said last-mentioned commissioners ; and the production of any schedule so deposited, and purporting to contain the name or names of any such defaulter or defaulters as aforesaid, shall be conclusive evidence against any person named therein as making default of payment, and against every parish, ward, or place named

Esch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

therein as in default of the sum or sums mentioned in any such schedule, being due and owing and in arrear and unpaid to his Majesty, his heirs and successors, unless payment thereof shall be proved; and every such sum shall be recoverable from the person or persons making default of payment thereof, *as a debt upon record* to the King's Majesty, his heirs and successors, with full costs of suit and all charges attending the same." It is contended on the other side, that inasmuch as in the latter part of the clause it is provided that the money shall be *recoverable* from the party making default, as a debt of record, therefore the Crown cannot proceed upon the former part of the clause, which simply states that "the production of the schedule so deposited, and purporting to contain the name or names of any such defaulter or defaulters as aforesaid, shall be *conclusive evidence* against any person named therein as making default of payment of the sum or sums mentioned therein, being due and owing and in arrear and unpaid to his Majesty, &c." It was contended at the trial that this proceeding was a great grievance to the defendant, and that if the proceeding had been by *scire facias*, the defendant would have been let in upon the merits; but that is not so, for the only question in that case would have been whether there was a record or not. This enactment makes it no more a matter of record than that the production of the parchment record shall be *conclusive evidence*, and that the debt shall be recoverable *as a debt upon record*. It was not meant that the Crown should proceed upon this schedule as being a record. [Lord Abinger, C. B.—It is possible to conceive that particular clauses were drawn by persons who had not a very concise and accurate knowledge of the form of proceeding and form of action; and perhaps this difficulty never occurred to them.] That probably is the real solution of the matter; but what is there to prevent the Crown from recovering against this defendant the sum of money which he is rendered liable to pay, and as to which the pro-

duction of the parchment schedule is made by the act conclusive evidence of its being due and owing? The Crown might have had a more summary remedy by extent or scire facias upon this parchment at the stamp office, but they have proceeded in the more usual and more favourable way for the defendant. [*Alderson*, B.—If you had proceeded in that way, there would have been a difficulty as to the evidence. You are in a difficulty either way.] But in neither way could the merits of the case have been entered into. [Lord *Abinger*, C. B.—The defendant will perhaps say, that if you bring your action in this form, the production of the schedule is conclusive, and nothing more can be said about it; but that if you had proceeded by scire facias, and the defendant had to shew why you should not have execution, there might be some difficulty in shewing that the schedule is conclusive.] That would be averring against the record, which he could not do. [Lord *Abinger*, C. B.—He might object to the record if he could shew some error in it: suppose he shewed that the schedules had not been duly signed by the commissioners, or had not passed through some form required by the statute.] He could not do that without some application to the Court to have the schedule brought in. The act has said that it shall be conclusive evidence. [*Alderson*, B.—If the schedule is not upon the face of it material, it would not be conclusive evidence. But in neither way could the defendant have entered into the merits of the case.] Certainly not: there could be no merits in this case. Here the defendant did appeal in one case—and the act has said that the judgment of the commissioners shall be conclusive; he did not appeal in the other case, but the competent authority has decided that the defendant is liable to pay the taxes imposed upon him, and his name is returned as a defaulter in the schedule. [Lord *Abinger*, C. B.—The 43 Geo. 3, c. 161, s. 23, requires the commissioners to issue their warrant to the

Esch. of Pleas,
1838.

ATTORNEY-
GENERAL
S.
SEWELL.

Book of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

collector, and says, that such part as cannot be collected may be recoverable as a debt of record to the King. Therefore the record is a record of this Court.] Then comes the subsequent act, 5 & 6 Will. 4, c. 20, which says it shall not be a record, but shall be lodged with the commissioners, and not in this Court. If it was a record, there was no occasion to say it should be conclusive evidence; but it is made conclusive, by express words, both of the sum being due, and of the default of payment. [Lord Abinger, C. B.—The act says that the schedule shall be conclusive evidence of the sum being due and in arrear, unless payment thereof shall be proved. It is inconsistent to say it shall be conclusive, but it may be answered: evidence that is conclusive admits of no answer.] Taking the whole together, it means conclusive except for a particular purpose. Supposing a *scire facias* were brought, it would be necessary first to lodge the record in this court; as when a *scire facias* is brought upon a bond, it is usual to file the bond here and to issue process. [Alderson, B.—The question here is, whether you should not have filed the schedule in court? How can the Court proceed upon a record which is not in court?] The Court could not proceed upon the schedule under a *scire facias*, if it was not in court: but here the Crown does not allege it to be of record. [Alderson, B.—The money is only recoverable as a debt of record.] That only means that it is conclusive evidence as a record; it would not be imperative upon the Crown. [Lord Abinger, C. B.—My idea is, that you must construe the words as you find them; that all this must be taken together; that it was meant that it should have the effect of a debt of record when recovered in that way: but the schedule was to be conclusive evidence of the debt. Alderson, B.—The question is, whether prior clear words may not be adopted by the Court, and the latter words that produce the inconvenience be rejected as nonsensical

or inapplicable,—that is the only argument in your favour; there is the word “recoverable”—which it may be argued means recoverable if the Crown pleases, or if the Crown can find out a mode of recovering it in that way.] It was not imperative upon the Crown to adopt that remedy. [Lord *Abinger*, C. B.—The difficulty has been to see how the record should be deposited with the Commissioners of Stamps, and process be issued upon it, to recover the debt, out of this court. That could not have been considered when the act was drawn. If the schedule had been brought in here, then the process could have issued. They have transferred the record to another place, which has made the Court feel a difficulty in dealing with it; if it had been brought into this court, that difficulty would not have arisen.] The Crown are thus deprived of the proceeding by *scire facias*, and it is submitted they may proceed by information, in which this schedule is conclusive evidence.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

Price, in support of the rule.—This question will depend upon the nature of the debt, and the nature of the proceeding to recover the duty granted by the legislature to the Crown. Now first, what is the nature of this debt? It is unquestionably in its nature a debt of record to the King, and not merely a debt of record, but to be recovered as a debt of record to the King. A debt of record to the King is in the nature of a judgment, on which nothing further is to be done. It is necessarily a judgment. The Crown may have simple contract *demands*, but can have no *debt* not of record. No man can be in the Exchequer indebted to the King except by record, or quasi record. It has been said that a debt on bond is not a debt of record: but no instance can be found of an information filed by the King to recover a bond debt. This is infinitely more than a bond debt. A debt due on bond is recoverable upon *scire facias*; but this is a

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

debt actually enrolled. It is very true it is no longer enrolled in this Court: because the act provides, that instead of being brought into the King's Remembrancer's Office, it shall be brought into the Head Office of the Commissioners of Stamps and Taxes,—making that office a branch and part of this Court: for the record, being lodged there, becomes a record of the Court of Exchequer. Whenever a public document concerns the King's revenue, it becomes a record of the King's Court of Exchequer: and wherever any such record is required to be filed, that place becomes a part of the Exchequer, for it is under the surveillance of the Court. [Lord Abinger, C. B.—Then the Commissioners of Stamps and Taxes are officers of the Court of Exchequer.] Unquestionably. [Alderson, B.—You say that the Lord Treasurer's Remembrancer is the head of the Exchequer?] The Lord Treasurer is the Master of the Court, and the commissioners its ministers. Every man concerned in the collection of the King's revenue is an officer of this Court, and under its immediate and peremptory control. The Crown has a particular process for the recovery of its debts, from which it cannot deviate. The main object of the Crown's proceedings is not only safety from danger of loss, but expedition in recovering its debts. When the Crown has a debt upon record, the King's officers have no right to put that debt in danger, and run the risk of postponing the King's judgment, which they do by this proceeding; and this Court cannot allow it to be done. They are bound, for a debt of this kind, which does not lie in demand but in distress, to pursue a particular remedy. The mode of proceeding, together with observations as to the nature of the Crown debts, is to be found stated in Lord Chief Baron Gilbert's *Treatise of the Exchequer*, page 96. He there says:—"Towards the time of Henry the 7th and Henry the 8th, as the revenue increased, and merchants were obliged to make payments, the customers and collectors received bonds from the

parties to the King. These collectors were no more than bailiffs or receivers, and not as justices between the King and the party, and therefore the acknowledgments before them were not in a court of record: and there was, before the 33 Hen. 8, c. 39, this difference between them and bonds of record, that these were immediately levied by the levary, but those debts not of record could not be levied by the levary, but a scire facias was to issue thereupon; and the reason of the difference is, that where an obligation is acknowledged in a court of record, such recognizance is the same as a judgment; the conusor is personally present, and the Court is supposed to know him as much as a defendant against whom they give judgment; and hence it is that the levary issues, and all the other prerogative process, and that the debt cannot be discharged until there be a receipt upon record."—Now, what becomes of *proving the payment*—according to the language of this act of parliament, "unless payment be proved?" If the party proceeded to pay the money into the King's own hands, it would be no proof at all. The defendant could not be discharged till he has his acquittance upon record, which in the Exchequer language is called a "quietus." The learned author then proceeds: "But where the King's ministerial officer takes an obligation to the King, such obligation is not of record, and when the officer delivers such obligation into court, the time of delivery is recorded. So that if that obligation be just, and the conusor has nothing to say against it, nobody can controvert the time of its lien, because the delivery is of record, and therefore it ought to bind from that time, but the obligation is no more than a warrant of attorney for the ministerial or other person to deliver it of record: for being an act in pais and not of record, the conusor may come in upon the return of the scire facias, and *traverse the obligation*: but in this it differs from a warrant of attorney, for if a man forge a bond and warrant of attorney, and then confesses judgment, the defendant can never deny the deed, if a scire facias issued

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
S.
SEWELL.

**Exch. of Pleas,
1838.**

**ATTORNEY-
GENERAL
v.
SAWELL.**

after a year and a day; but in this case there is no judgment upon the bond, for the bond is only delivered of record, and therefore the judgment upon the bond arises only on the scire facias: and therefore in Ireland they often take a warrant of attorney to confess judgment. . . .

When the solicitor for the Crown has directions to sue upon a bond only, he lodges the bond in the Chief Remembrancer's Office, and immediately a scire facias issues thereon, either to the proper county, or two scire facias to the city of Dublin." That is the mode of proceeding in Ireland, and it is exactly the same as here.—The author is here speaking of proceedings which he says are not affected by the course of the Exchequer in any way:—"If bond with warrant of attorney be entered into, the warrant is brought to the officer who enters a consent in his book of judgments, that judgment be forthwith entered up for his Majesty, and that execution may issue. In this case there is a scire facias made out, signed by the officer and filed, but never sealed, which is first enrolled, and is in the nature of a declaration at common law, and the judgment made as those on the plea side, by cognovit actionem, because they would not stay the return of two scire facias to delay the King's execution, nor clog the rolls with two writs and two returns from the sheriff. But when judgment is given in debt there may a levavi immediately, because it is an immediate execution of the King's judgment, and the taking out a scire facias proceeds from the ignorance of the clerks in taking out such scire facias, as if only a bond had been sued, and there had been no warrant of attorney given to enter judgment." By this the nature of the King's debt is clearly shewn, as well as the mode of its recovery; and these proceedings are as clearly informal, though such has been the practice, as it is said, since the passing of the 43 Geo. 3. It is difficult to understand the meaning of making the schedule conclusive evidence. What is it evidence of? The words "conclusive evidence" would imply, that it is not necessary to go into

evidence at all. And where is the use of an information? it is only to make that a matter in pais, which is already expressly made a matter of record. [*Gurney, B.*—It is to be conclusive evidence, “unless payment thereof shall be proved.” *Lord Abinger, C. B.*—Conclusive evidence of the debt, unless payment is proved, means, I suppose, that it is *primâ facie* evidence only.” The object was to throw the onus of proving payment on the defendant.] Lord Chief Baron Gilbert has told us the modes of proceeding to recover the King’s debts, and the nature of those debts. It appears that the Crown has prerogative remedies, and it is bound to adopt them. These proceedings are properly distinguished by that learned judge, who uses these words:—“For debts in fieri an information is the proper course, but when once they are reduced to a certainty, the proceeding must be by distress:” and he adds, “A debt recoverable as a debt of record, is in other words leviable by the sheriff:”—that is his translation of “recoverable as a debt of record.” The revenue of taxes has been put by Blackstone and other writers upon the ground of ancient duties to the Crown, which were leviable in kind without any proceeding at all. Therefore it is clear that this is a defined and settled debt, upon which the great privilege of the Court of Exchequer ought to be exercised, “for its speedy levy and for the soonest satisfaction of the King’s debt.” The course of proceeding in this case should have been by *levari* at once: the writ should have been issued immediately upon this schedule. The *levari* is clearly a writ intended to supersede any other measure for the more speedy recovery of the King’s debt. [He here read the form of the writ, which he had obtained from the King’s Remembrancer’s Office.] The schedule would be recited in the writ; it is therefore in the nature of a writ issuing on a judgment of this Court and out of this Court. [*Lord Abinger, C. B.*—You mean to say that a slight alteration in this writ would make it apply to the present case, by setting forth that it was a record

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

in the possession of the Commissioners of Stamps, according to the act of Parliament.] Yes: it is submitted that the Head Officer of the Commissioners of Stamps and Taxes is an officer of the Court of Exchequer to all intents and purposes. [*Alderson*, B.—It turns upon the second rule of the 48 Geo. 3, c. 141 (class V.), which says that “every such schedule, being certified under the hand of the Receiver-General or his deputy of the county or division where the said arrears accrued, to the Court of Exchequer at Westminster, shall be received and taken as sufficient evidence of a debt due to his Majesty, and shall be a sufficient authority to the Barons of the said Court or any one of them, to cause process to be issued against such defaulters named in the said schedules to levy the whole sum in arrear and unpaid by such defaulters, and the sheriff or other officer to whom the said process shall be directed shall without delay cause the whole sum in arrear to be levied.” Therefore, upon the schedule being returned, there is an express power to issue a *levari facias* upon it.] The same writ is to issue in all cases in *pari materiâ*, and the debts are to be recovered as of record. [Lord *Abinger*, C. B.—The proper process for recovering a debt of record by the Crown is by *levari facias*, and if the party against whom it issues has equitable pleas to plead, he may plead them, or apply by motion, which is the more ordinary case, to remove the hands of the sheriff and let in the equitable claim.] In cases of extent it is so. [Lord *Abinger*, C. B.—The point that arises is this, whether in the construction of this statute the Crown has not a right, if it thinks fit, to resort to the popular form of action for the recovery of a debt of record. *Alderson*, B.—The question is, whether this sum returned is a debt of record.] Not precisely: it is sufficient to shew it is a debt as of record. [*Alderson*, B.—A debt that may be made a debt of record. Lord *Abinger*, C. B.—Suppose an assessment were made, and a party were included in it who was not living in the place, and yet that, by some

Rept. of Pleas,
1838.

ATTORNEY-
GENERAL
a.
SWEET

of assessing or charging the said duties, in any parish, ward, or place, or of returning the duplicates of assessments made for any such parish, &c. or of raising or paying the several sums charged upon any person or persons, in any such parish, &c., the Receiver-General shall certify the same to the Barons of the Exchequer, with the names of the commissioners, assessors, &c., who shall be respectively liable to process from time to time by writ of distringas. Then we come to the 5 & 6 Will. 4, c. 20, upon which it is expressly admitted that this proceeding is founded. The 13th section enacts, that the schedule "shall be delivered over or transmitted by the Receiver-General, Receiving-Inspector, &c., to whom the same shall have been delivered, to the Commissioners of Stamps and Taxes, and shall be deposited and remain in the Head Office of the said last mentioned commissioners." [*Alderson, B.*—The act says in substance, instead of delivering it into this Court it shall be delivered to the Commissioners of Taxes; and you say that is a delivery into the Court of Exchequer. How is that consistent? It is not delivered into any part of the Exchequer, but at the office of the commissioners.] It is submitted that wherever the statute requires an Exchequer muniment to be deposited, the legislature virtually makes that office a part of the Court. [*Alderson, B.*—You must say that when it was in the Receiver-General's hands it was in the Court of Exchequer; but the 43 Geo. 3, says that the Receiver-General is to return it into the Court of Exchequer.] It is not attempted to go that length. [*Lord Abinger, C. B.*—It is not necessary to go that length. The question is, whether it was the intention of the act to give to a document that was formerly brought into Court, the same force and effect as if it were now brought into Court?] It is submitted that it cannot be otherwise. It is at all events quasi a record. [*Lord Abinger, C. B.*—You say, that as the Exchequer has the general superintendence of all the revenues of the

Crown, from which process can issue wherever there is a record regarding such process, the Exchequer is the proper court for the cognizance of that record. *Alderson, B.*—Your argument is, that while it is in the office of the head commissioners it is a record.] The delivery into Court of an obligation, such as is spoken of by Lord Chief Baron Gilbert, means the delivery of the obligation under which the Crown proceeds, and which is sanctioned by the practice of the Court, and the Court is the proper recipient of, and the proper depository for, such a muniment. The language of Lord Chief Baron Gilbert is, that “when the King’s ministerial officer” (which these commissioners may be called,) “takes an obligation to the King, such obligation is not of record, and when the officer delivers such obligation into Court the time of its delivery is recorded,” because the delivery is of record. The delivery into the Stamp Office means a delivery into Court, because it must be proved. The latter part of the 13th section says, that the schedule “shall be conclusive evidence against any person named therein as making default of payment, and against every parish, &c., as in default of payment of the sum or sums mentioned in any such schedule being so due and owing and in arrear and unpaid to his Majesty, &c., unless payment thereof shall be proved, and every such sum shall be recoverable from the person and persons making default of payment thereof as a debt upon record to the King’s Majesty, &c.” If that clause be compared with the language of the *levari facias* and *distringas*, it is decisive that this proceeding by information is erroneous; the making it of record is the foundation for that immediate and speedy process which throughout the whole of the act the officers of the Court are peremptorily required to adopt. The act in fact says, whatever language we use, we shall be understood when we say a debt shall be recovered as a matter of record; you shall not recover it as a matter in pais, but you

Esch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

shall issue a *levari facias* or a *distringas*. The construction contended for is in aid of rather than in derogation from the right of the Crown, and is an argument for the more strict enforcement of the King's right, and the recognised practice of the revenue laws. On these grounds, it is submitted that this rule ought to be made absolute.

The *Solicitor-General* replied.—[Lord *Abinger*, C. B.—Let me call your attention to this view of the question. There are two or three cases at which we have to look. One is the case of an individual who does not pay, and the other the case of a loss which the parish at large is to make good: it is the duty of the collector to make proper returns of both, to be put into the schedule. Now they are both embraced in the 13th section of 5 & 6 Will. 4, c. 20, and they are both to be deposited with the Commissioners of Stamps. Suppose this had been the case of a parish in default; the charge being against the whole parish, you cannot file an information, as they are not a corporation. What process would you take under the act to enforce the debt?] The Crown would proceed against the parish just as they would have done before the passing of this act, and the production of the schedule would be conclusive evidence against the parish as a default. [Lord *Abinger*, C. B.—You must have applied to a Judge of this court, and have produced the schedule, and then have shewn by affidavit that it was duly deposited with the commissioners, and then have applied for a *distringas* as against the parish. As you must do that in the one case, why should you not in the other case do the same thing?] It is not meant to be said that such a proceeding might not be taken against an individual in the same way. [*Alderson*, B.—You might have brought the schedule into court. Lord *Abinger*, C. B.—That removes the difficulty, supposing it to have been one, and it may have been so felt by the Commissioners of Stamps. It is with them that the schedule is now de-

posited, and it might be a more convenient place of deposit, so that the Commissioners of Taxes might have more free access to it than they could have in this Court; but still the intention was that they should come to the only Court that could issue the process, which is this Court, and upon the production of that voucher the Court would issue the levary. It is to be left with the commissioners till wanted, and then it is to be produced by them to the Court.] That is probably the meaning of the act. It will be necessary to consider the case of a parish when it arises, but it is submitted there is nothing to prevent the Crown from adopting this proceeding in the present case, there being a debt due to the Crown, of which the production of the schedule is to be conclusive evidence. [Lord Abinger, C. B.—There can be no reason why the Crown, if it had the summary process upon the schedule of a levary facias, should go through the form of an information and a trial.] This is the mode of proceeding which always was taken before the passing of this act, except that the schedule was not conclusive evidence. [Lord Abinger, C. B.—It is recoverable “as a debt upon record.” What is the meaning of those words?] The Crown might perhaps have proceeded by scire facias, where the debt is per recordiam. [Lord Abinger, C. B.—I feel the force of the argument on the other side, that as the Crown had a summary process to recover the debt, why should they be put in a worse situation, by being obliged to bring a popular action of debt? There *may* be a reason, for aught I know, in the detail of office, for that delay of the Crown. Alderson, B.—A document is to be produced as conclusive evidence, but it is to remain in the Stamp Office. It is strange that it should be produced as a record in the Exchequer, and yet remain in the office of the commissioners. One can understand its being to be produced at the trial, for then it would go back again.] There is little doubt that those words, “recoverable as a debt upon record,” were

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

copied from the old act without considering the effect of them, and without seeing that they had become not only unnecessary but contradictory. [*Alderson, B.*—It is quite clear that the act has been drawn by one person, and settled by another, and probably the words “unless payment thereof shall be proved,” were put in by the latter without striking out the words “shall be conclusive evidence;” the latter words having been in the act as originally drawn, and it being considered unjust that they should remain there without being qualified by the other words.] The only way in which it can be reconciled is by considering it as an additional benefit given to the Crown, the Crown in a prior part of the clause having a right to proceed as if there were no such words: then it is added, that they may proceed upon it as a debt of record. With respect to the argument, that under the statute of Henry the Eighth, the defendant would be let in to shew his equity; how could that be, when it is to be finally adjudicated upon by the commissioners, by the express direction of the 43 Geo. 3; and how could any objection that the commissioners have so disposed of, be in the eye of the law equity and good conscience, and be again opened? There is no appeal against the judgment of the commissioners, except by applying to the Judges in a mode not now in question. The construction contended for by the Crown is this:—the statute says that the schedule, instead of being returned into the Exchequer to be a quasi record, is to be kept where it is more convenient, by the Commissioners of Stamps and Taxes; and when it is there, that the production of it shall be conclusive evidence of the money being due, and of the Crown being entitled to judgment. The only embarrassment arises from the latter words, saying that it shall be recoverable “as a debt of record,” but the Crown contends that that is merely supererogatory. There is a positive enactment that the production of the document shall be conclusive evidence of the debt being due; the provision as to the production of that document is not con-

nected with the subsequent words, which provide that the Crown may proceed as of record.

Cur. adv. vult.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

The judgment of the Court was delivered in this term by

LORD ABINGER, C. B.—This was an information filed by the Crown, not purporting to be filed upon any document or any record, but simply stating that the defendant had been assessed in certain taxes, and that a warrant had issued against him signed by the commissioners, but that the amount had not been nor could be collected under it, and that the same remained due and in arrear and unpaid to his Majesty, whereby an action had accrued, &c. The information was supported at the trial by the production of the assessment itself from the Tax-Office, in which the defendant was found to be in arrear for the sum of money stated in the information, and sought to be recovered. It was contended on the part of the Crown, that by a modern statute, the 5 & 6 Will. 4, c. 20, s. 13, the assessment was made conclusive evidence; but on the part of the defendant, it was objected by Mr. Price that the same statute made the debt recoverable *as a debt of record*, and that the Crown could only recover a debt of record by scire facias or extent, or by filing an information upon the record itself. This was an information in the nature of a popular action of debt, without any record at all. My impression originally at the trial was, that the objection must prevail. The Court has however taken time to consider it, and, with some degree of reluctance, we have come to the conclusion that the objection was a valid one, and that a verdict must be entered for the defendant. It is very remarkable that by this act of Parliament, the assessments that used to be returned into this Court are now returned to the Commissioners of Taxes, and are to be kept in their office; and yet the person who is in arrear is made

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
SEWELL.

liable to pay the arrears as a debt upon record. The document is by the act required to be kept by commissioners in Somerset House; and though no doubt the object of the act was very laudable and correct, it is very unfortunate that the words "shall be recoverable as a debt upon record" were used in it. We know of no means to recover the arrears as a debt upon record, except by scire facias, or by extent, or by filing an information upon the record itself. Here there is nothing but a mere assessment and a warrant.

Rule absolute to enter a verdict
for the defendant.

RADFORD v. SMITH.

On motion for judgment as in case of a nonsuit, an affidavit that the plaintiff had not proceeded to trial for want of funds, but expected to be in funds so as to try at any time after the 1st of July, was held a sufficient excuse to discharge the rule on a peremptory undertaking to try in Michaelmas Term.

COWLING (on the 12th of June) shewed cause against a rule for judgment as in case of a nonsuit, on an affidavit of the plaintiff, stating that his only reason for not having proceeded to trial in due time was, that he had been disappointed in the receipt of a remittance from the country, and that he expected to receive one so as to enable him to go to trial at any time after the 1st of July next.—He offered a peremptory undertaking to try in Michaelmas Term, and urged that this, being a mere temporary want of funds, furnished a sufficient ground for discharging the rule on these terms; in the same manner as a temporary incapacity from a domestic affliction, which had been held a sufficient excuse: *Weak d. Burge v. Callaway (a)*.

Mansel, contra, cited *Cleasby v. Poole (b)*.

PARKE, B.—Under the circumstances, I think it is not unreasonable to discharge the rule on the terms proposed.

(a) 7 Price, 531.

(b) 1 C. M. & R. 521.

It is different from the case of a permanent insolvency, which was the excuse set up in *Cleasby v. Poole*; here it is only that the plaintiff is not in funds at present, but expects to be so within a definite period, namely, the first of next month.

Exch. of Pleas,
1838.

RADFORD
v.
SMITH.

Rule discharged.

LOUISA CURSHAM, SUSANNAH W. MERRICKS, and HARRIET MERRICKS, v. WILLIAM CHARLES NEWLAND and Others.

BY order of the Master of the Rolls, the following case was sent for the opinion of this Court (a).

Richard Merricks made his will, duly executed and attested, and bearing date the 2nd day of June, 1821, and thereby (amongst other things) gave and devised his undivided third part of certain messuages, lands, tenements,

A testator, by the residuary clause of his will, devised as follows:—"I give, devise, and bequeath all the rest of my freehold, copyhold, and leasehold estates, and all

other my real and personal estate, according to the nature and quality of such estates respectively, unto my wife E. M. for her own use during her natural life, and, after her decease, unto my said son and daughters, and their *lawful issue* respectively, in tail general, with benefit of survivorship to and amongst their issue respectively as tenants in common, and not as joint tenants; provided, that such issue not to have a vested interest until they attain the age of 21, being sons, and, being daughters, until they attain that age or are married; but during the minority of the said issue of my said son and daughters, I authorize my trustees, or the survivor of them, or his heirs, after the death of my said son and daughters respectively, to apply the whole or any part of the rents and profits of the said estates, and not exceeding the interest of the presumptive share of such child therein, for and towards his, her, or their maintenance, education, and advancement during minority: and in case my said son and daughters, or any of them, shall die in my lifetime, or after my decease, without leaving lawful issue, or with lawful issue which, being a son or sons, shall not attain the age of 21, or, being a daughter or daughters, shall not attain that age or be married, then the share or shares of him, her, or them so dying to be for the benefit of the survivors and their issue, in the same manner as their original shares are hereinbefore given to them respectively." In previous clauses of the will, the testator had created trusts of different sums of money for the benefit of his son and daughters and their issue; and it was admitted that in those clauses the word "issue" was used to describe their children:—*Held*, that in the residuary clause also, the words "lawful issue" were to be construed as words of purchase, and not of limitation, and as designating the children of the testator's son and daughters; and that the son and daughters took estates for life in the freehold property thereby devised, with contingent remainders in tail to their respective children, with cross remainders in tail amongst such children respectively, and cross limitations over amongst the children of the respective families.

(a) The same case had previously been sent for the opinion of the Court of Common Pleas.

See 2 Bing. N. C. 58; 2 Scott, 105.

Exch. of Pleas,
1838.

CURSHAM
v.
NEWLAND.

hereditaments, and premises, situate in the parish of Hel-
lingly, in the county of Sussex, in the occupation of his
nephew B. W. Gilbert, or his undertenants or assigns,
unto and to the use of his nephews, B. W. Gilbert and G.
F. Gilbert, and their assigns respectively, during their na-
tural lives, and the life of the longest liver of them; and
after the determination of those estates by forfeiture or
otherwise in the lifetime of his said nephews or the sur-
vivor of them, to the use of his trustees, W. C. Newland,
W. W. Holland, and H. Hall, and the survivors and sur-
vivor of them, and the heirs of such survivor, during the
natural lives of his said nephews and the life of the sur-
vivor of them, upon trust to preserve the uses therein
limited from being defeated, &c.; and from and after the
decease of his said nephews, or the survivor of them, to
the use of all and every the lawful *children* of them his
said nephews, and their heirs and assigns for ever, as
tenants in common: and in case there should be only one
such *child*, then to such only child and his or her heirs
and assigns for ever; but in the event of there being no
such child, or there being children of his said nephews, or
such only child, and they or he or she dying in the life-
time of the said B. W. Gilbert and G. F. Gilbert, or the
survivor of them, without leaving lawful *issue*, then from
and after the decease of the said B. W. Gilbert and G. F.
Gilbert, and the survivors of them, the testator gave and
devised all the said messuages, &c., to the same uses as
he had thereafter directed as to the disposal of his resi-
duary real and personal estate and effects. And the tes-
tator directed that his trustees should, within three calen-
dar months after his decease, lay out and invest in their
names, in some of the Government funds, the sum of 4000*l.*
sterling, and stand possessed of the stocks and funds so
purchased, upon the trusts following: that is to say, [in
trust for his son Richard Merricks and any wife surviving
him, for life]; and from and after the decease of the sur-

vivor of them, upon trust to pay the principal of the said trust monies, stocks, or funds, in equal shares unto and amongst all and every the *children* of his said son Richard Merricks lawfully begotten, who should live to attain the age of twenty-one years, being a son or sons, or being a daughter or daughters, should live to attain that age or be married with the consent of parents or guardians; and if there should be only one child of his said son who, being a son, should live to attain the said age, or being a daughter, should attain the said age or be married with such consent as aforesaid, then upon trust to pay, assign, or transfer the whole of the said trust stocks or funds to such only child, for his or her own use and benefit absolutely. But in case his said son, Richard Merricks, should die without leaving *lawful issue*, or leaving lawful issue, *such issue, being a son*, should not live to attain the age of twenty-one years, or being a daughter, should not attain that age or be married as aforesaid, then upon trust, immediately after the decease of his the testator's said son Richard Merricks and his wife, and the survivor of them, to pay, assign, and transfer the said principal trust stocks and funds in equal shares between and amongst the testator's four daughters, Elizabeth Buckton, Louisa Merricks, Susannah W. Merricks, and Harriet Merricks, who should be then living, or the *lawful issue* of such of them as should be then dead, *such issue* taking the part or share which *their, his, or her mother* would have been entitled to had she been then living; such share to be divided in equal parts, shares, and proportions amongst the children of such of his daughters who should be then dead, if more than one, and if but one, then the whole of such his deceased daughter's share should go and be paid to such only child; and if neither of the testator's said daughters should be living at the decease of his said son Richard Merricks and his wife, without leaving *lawful issue as aforesaid*, then he directed

Exch. of Pleas,
1838.

CURSHAM
v.
NEWLAND.

Exch. of Pleas,
1838.

CURSHAM
v.
NEWLAND.

that the whole of the said trust stocks and funds should be divided between and amongst all his grandchildren, being children of his aforesaid daughters, equally between them. The testator then directed the investment of three other sums of 3000*l.* each, for the benefit of his unmarried daughters, and *their respective issue* lawfully begotten, “upon exactly the same trusts, and to and for the same ends, intents, and purposes, with regard to his said daughters, and any husbands they might leave surviving them, and the *lawful issue* of them his said daughters respectively, with remainder over, *on failure of issue*, to his said son and his other daughters and their issue, as were before declared with respect to the said sum of 4000*l.* thereinbefore directed to be laid out for the benefit of his said son Richard Merricks, and any wife and issue he might leave.” After a similar trust declared of a further sum of 1000*l.* limited to the separate use of the testator’s daughter, Elizabeth Buckton, the will contained the following residuary devise:—“I give, devise, and bequeath all the rest of my freehold, copyhold, and leasehold estates, with all my household goods, plate, linen, china, and all other my real and personal estate, with their appurtenances, according to the nature and quality of such estates respectively, to my dear wife, Elizabeth Merricks, for her own absolute use and benefit for and during the term of her natural life; and from and immediately after her decease, unto my said son and daughters, Richard Merricks, and Elizabeth the wife of the said George Buckton, Louisa Merricks, Susannah Woodyer Merricks, and Harriet Merricks, and their *lawful issue* respectively, in tail general, *with benefit of survivorship* to and amongst their issue respectively, *as tenants in common*, and not as joint tenants: provided always, that such *issue* not to have a *vested interest* until they attain the age of twenty-one years, *being sons, and being daughters*, until they shall attain that age or be married; but during the minority of the *said issue*

of my said son and daughters respectively, I do hereby authorize my said trustees, or the survivors or survivor of them, or the heirs of such survivor, after the death of either my said son or daughters respectively, to apply the whole or any part of the rents, issues, and profits of the said estates, and not exceeding the interest of the presumptive share of each *child* therein, for and towards his, her, or their maintenance, education, and advancement in life during minority; and in case my said son and daughters, or any or either of them, shall die in my lifetime, or after my decease, without leaving lawful issue, or with lawful issue which, being *a son or sons*, shall not live to attain the age of twenty-one years, or being a daughter or daughters, shall not live to attain that age or be married, then the part or share, or parts or shares of him, her, or them so dying, to be for the benefit of the survivors and their issue, in the same manner as their original parts and shares are hereinbefore given to them respectively as aforesaid."

Exch. of Pleas,
1838.

CURSHAM
v.
NEWLAND.

And the testator appointed the said W. C. Newland, W. W. Holland, and Henry Hall, executors of that his will.

The testator departed this life on the 26th day of June, 1822.

The said B. W. Gilbert has one child only, the defendant Thomas Gilbert. The said G. F. Gilbert never has had any child. The said Richard Merricks, the son of the testator, has never had any child. The said Louisa Merricks, now Louisa Cursham, (one of the plaintiffs,) never had any child. The said Elizabeth Buckton, (one of the defendants,) has seven children, all of whom are infants under the age of twenty-one years.

Elizabeth Merricks, the devisee for life, died in the month of April 1823.

The question for the opinion of the Court is, what estates the children of Richard Merricks, the testator, took in the freehold, copyhold, and leasehold lands respectively devised by his will, and whether the grand-

Book of Pleas,
1838.

CURSEMAN
v.
NEWLAND.

children take by purchase any and what estates in the same lands respectively, or any of them.

The following were the points for argument stated on each side :—

The plaintiffs will submit that they take estates tail in the residuary freehold and copyhold estates, subject to limitations over by way of contingent remainder, and that they take corresponding interests in the residuary leasehold estates held for years, subject to a limitation over by executory bequest, and that there are interests in the nature of cross-remainders in favour of the plaintiffs, as between them and their co-devisees, Richard Merricks and Elizabeth Buckton.

The defendants will contend that the residuary freehold and copyhold estates are devised to the testator's son and daughters, as tenants in common, for their respective lives only, with contingent remainders of their respective shares to their respective children, by purchase, as tenants in common in tail, with cross remainders between the children in tail, with cross limitations between the families : and that the residuary leasehold estates, i. e. chattels real, are subject to corresponding limitations.

The case was argued in Hilary Term, 1837, by

Hodgson, for the plaintiffs.—The plaintiffs are the three daughters of the testator, who were unmarried at the date of his will, and the defendants are children of their sister, Mrs. Buckton. The plaintiffs contend, first, that they take estates tail under the residuary devise ; or secondly, that if they take for life, with limitations over by way of contingent remainder to their children, they take vested remainders in tail in their respective shares.

First. The decision of this case depends upon the construction to be assigned to the words “lawful issue” in the will ; whether they are to be considered words of limitation or words of purchase. The general rule for the construction

of these words was laid down by Lord *Eldon* in *Doe d. Jesson v. Wright* (a), and a very clear exposition of it has more recently been given, in the case of *Lees v. Mosley* (b), in this Court; the construction there adopted, if it is to prevail in this case, was undoubtedly adverse to the plaintiffs; but it will be submitted that the present case is distinguishable in its circumstances, and by the peculiar language of the will. It is an obvious remark, that the framer of this will appears in all the preceding clauses to have perfectly understood the legal effect of the terms used: in the devises to the nephews, and the trusts for payment of legacies to the children, the words are all clear and intelligible: whilst in the residuary devise all is confusion and difficulty. The principle is fully recognised, that where a testator uses words which have a technical meaning, or have acquired a known legal import, they shall receive that construction, unless it be distinctly shewn that he had a contrary intention. The term "issue" may be said to stand, in legal construction, between the words "heirs of the body" and other more indefinite words. But, in truth, the terms "heirs of the body" and "issue" are strictly synonymous. They are so used in the most strictly drawn marriage settlement,—where the first limitations in tail will be to A. and the heirs of his body, and then, in limiting the remainder, the phraseology always is—"in default of such issue, &c." "Issue," therefore, is *prima facie* a word of limitation. The question then is, whether in this devise a clear intention is manifested to use it in a different sense. Now this residuary clause comprises both real and personal estate; and the decision of the case will turn much upon that circumstance, and upon the distinctions applicable to each. But let it be supposed for the present to be a devise of real estate only: it is clear that the testator had in his contemplation different persons who were

Exch. of Pleas,
1838.

CURSHAM
v.
NEWLAND.

(a) 2 Bligh, 2.

(b) 1 Younge & Col. 589.

Exch. of Pleas,
1838.

CURSHAM
v.
NEWLAND.

to take different quantities of estate, viz. estates for life and estates in tail. The first clause expressly limits the gift to his wife for life; if the children were to take no more, why is it not limited as expressly to them? It may undoubtedly be read as *two* devises, so as to give estates for life to the son and daughters, with remainders in tail to their issue; but that appears a violent construction of the words. The testator could hardly have expressed his intention of giving estates tail to the children more plainly, unless he had said “unto my said son and daughters and the heirs of their bodies respectively.” But it will be said that the subsequent clauses, as to the time of vesting, the benefit of survivorship among the issue, &c., are inconsistent with this conclusion, and it must be admitted that they present much difficulty. But there are authorities to shew, that where there is a gift to the first taker for life, and afterwards to his issue, “with benefit of survivorship,” these latter words have been disallowed, and have not prevented the devise from being construed to give an estate tail. The general intention of the testator is that all the issue shall take, but he wishes them to take in a particular mode, other than the rules of law will permit, and so has introduced some inconsistency into the devise. So, the provisions that they shall not take “vested interests” until they attain twenty-one, and for maintenance during their minorities, do not necessarily militate against the construction of an estate tail to their parents. The son and daughters might die without having disposed of the estate, and therefore the testator provides for the minorities of their *heirs of the body*. He cannot have intended to use the words “vested interest” in their strict sense; he must mean that they, that is, the *immediate* issue of his children, for whom the rules of law allowed him to make provision during their minorities—shall take no interest *in possession* till twenty-one. Again, the clause providing that on the death of any of the children in the

testator's lifetime, or their issue under twenty-one, their shares shall go over to the survivors or their issue, creates a further difficulty. But devises of this kind also have been held consistent with the construction of an estate tail; in some cases they have been said to create a contingent remainder on the estate tail. The present case, however, presents a readier solution of the difficulty. This is a devise of real and personal estate: as to the latter, there *can be* no limitation over after a general failure of issue of the first taker; but the rule against perpetuities is evaded by giving an absolute interest to the first taker, with a proviso that the estate shall go over if he dies without leaving issue, or, if leaving issue, they die under age. Now, this testator, having to provide for the case both of personal and real property, instead of keeping the limitations as to each distinct, has combined them in one clause, introducing provisions which are perfectly proper as to the leasehold, but unnecessary and inapplicable as to the freehold; since, at whatever age the first taker dies, the freehold estate will go over on failure of his issue.

Each. of Pleas,
1838.

CURSEMAN
v.
NEWLAND.

The authorities applicable to this question may be classed under five heads. First, those which have arisen on a devise to a man and the *heirs of his body*, and which it is only necessary generally to refer to: *Goodright v. Pullyn* (a), *Wright v. Pearson* (b), *Doe d. Candler v. Smith* (c), *Doe d. Bagnall v. Harvey* (d), *Doe d. Wright v. Jesson*. Secondly, cases which have turned on a provision for the contingency of the devisee dying under twenty-one, the words still being "heirs of the body": *Doe d. Candler v. Smith*, *Doe d. Strong v. Goff* (e), *Crump v. Norwood* (f); the two latter being indeed overruled by *Doe d. Wright v. Jesson*. Thirdly, cases where the

(a) 2 Lord Raym. 1437; 2 Str.
729.

(b) Ambl. 358; 1 Eden, 119.

(c) 7 T. R. 531.

(d) 4 B. & Cr. 610.

(e) 11 East, 668.

(f) 7 Taunt. 362.

Exch. of Pleas,
1838.

CURSHAM
NEWLAND.

word *children* was used, as in *Wollen v. Andrewes* (a), and *Mortimer v. West* (b). In all the cases above cited, the devises have been held to carry estates tail. Fourthly, where the word "issue" has been used: thus, in *Doe d. Blandford v. Applin* (c), where the devise was to A. for life, and after his decease *to and amongst his issue*, and in default of issue, then over, A. was held to take an estate tail, the word *amongst*, which imported division, being rejected, as inconsistent with the general intention of the devisor. So in *Doe d. Cock v. Cooper* (d), and *Roe v. Grew* (e), where there was a devise to A. for life, and after his decease *to his issue as tenants in common*, but in case A. should die without leaving issue, over: this was held to give A. an estate tail, and the cases were considered analogous to those which had arisen on the rule in Shelley's case, and in which it had been ineffectually contended that the words "heirs of the body" might be considered words of purchase, where words of limitation were superadded. *Frank v. Stovin* (f), *King v. Burchell* (g), (in which case there was a proviso against alienation, which is *prima facie* altogether inapplicable to an estate tail), *Franklin v. Lay* (h), *Denn d. Webb v. Puckey* (i), *Murthwaite v. Jenkinson* (k), *Mogg v. Mogg* (l), are all cases falling within this class, and in all of which the word "issue," notwithstanding qualifications supposed to be inconsistent with that construction, was held to import an estate tail. In *Harvey v. Harvey*, before the present Vice Chancellor (m), the word *issue* was expressly contrasted on the face of the will with the words *heirs of the body*; it contained

(a) 2 Bing. 126.

(b) 2 Sim. 276.

(c) 4 T. R. 82.

(d) 1 East, 229.

(e) 2 Wils. 324.

(f) 3 East, 548.

(g) 1 Eden, 424; Ambl. 379.

(h) 2 Bligh, 59, note.

(i) 5 T. R. 299.

(k) 2 B. & Cr. 358; 3 D. & R. 765.

(l) 1 Meriv. 654.

(m) Reg. Book, A., 1833-4, fol. 1361.

Exch. of Pleas,
1838.

CURSHAM
v.
NEWLAND.

mainders in tail to the issue of each, they took the next immediate remainder to themselves in tail, and consequently, that part of the certificate of the Court of Common Pleas which stated that cross remainders in tail were created among the grandchildren, ought not to be adopted. The leading authority on this point is *Doe d. Bean v. Halley* (a), in which the devise was to Michael Halley for life, sans waste, remainder to his first son and his heirs, with a condition that he took the testator's name, and in default of issue male of M. H., then over; and it was held that M. H. took for life, with remainder to his first son in tail male, with remainder to himself in tail male. That is a strong and conclusive authority in the present case; and the case of *Doe d. Gallini v. Gallini* (b) is also an authority, for there it was held that there were two estates tail. If this construction be adopted, the cross remainder clause becomes very simple; but if the Court should hold that the devise was to the son and daughters for life, with remainder in the share of each to the children of each in tail, the application of cross remainders becomes very difficult, for it must take place, first as between grandchildren in each share, and afterwards as between children and grandchildren (i. e. between the series of limitations under which they are to take) in the entirety; which, to express it intelligibly, would require a voluminous limitation, which it is impossible for the Court to imply.

Teed, for the defendants.—The true construction of the will is, that the children take estates for life, with contingent remainders in tail to the grandchildren, with cross remainders in tail between them; and if any of the children die without children to take, their shares to go

(a) 8 T. Rep. 5.

on error, 3 Ad. & E. 341, 4 Nev.

(b) 5 Barn. & Ad. 621; S. C. & M. 894.

over among the other children for life, with remainders among their children in like manner. The first question is, whether the devise to the children of the testator is for life or in tail; and that undoubtedly turns on the meaning to be assigned to the word *issue*—whether it is to be strictly translated *descendants*, or is not rather to be construed *children*—as translated by the testator himself. It is clear that in almost every preceding part of the will he has used *issue* and *children* as synonymous words. The issue to take the share of the mother must clearly be a child or children. So, the provision for the maintenance during the minority of the issue of his son and daughters has a plain reference to their children, to whom he refers expressly by the use of the term “*said issue*” (as to which, see *Sibley v. Perry* (a)). The testator has, therefore, himself explained the sense in which he uses the word, and shewn that he did not mean it to apply to an indefinite line of descendants, but only to the immediate issue of his children. In none of the cases cited on the other side (except that of *Harvey v. Harvey*) was there a clause for maintenance during the minority of the issue. On the other hand, the cases of *Thompson v. Brandwood* (b), *Ryan v. Cowley*, *Lees v. Mosley*, and *Horne v. Barton* (c), are strong authorities in support of the construction contended for by the defendants. Where the will contains a gift over on failure of issue, and the intention of the testator can therefore be effectuated only by construing the original devise as an estate tail, the courts put that construction upon it. But here there is no gift over, and the intention of the testator will be fully effectuated by giving the grandchildren an estate tail. On the other hand, the construction contended for by the plaintiffs would altogether defeat his presumed intention of an equal division of the property amongst his sons and daughters; for if

Esch. of Pleas,
1838.

CURSHAM
NEWLAND.

(a) 7 Ves. 522.

(b) 1 Madd. 381.

(c) Cooper, 257.

Reck. of Pies,
1886.

CURSHAM
v.
NEWLAND.

one of them had died in his lifetime, the share of the child so dying would have lapsed.

The other point raised by the plaintiffs is not of much importance to the defendants: it is submitted, however, that the gift over on failure of any of the issue is to take effect in the same manner as their original shares, that is, cross remainders for life are created among the children of the testator, with cross limitations in tail among their respective children.

Hodgson, in reply.—The testator has certainly used the word issue in the clauses relating to the personalty, not in its strict legal sense; but it has, nevertheless, a certain and definite signification in the devise of the realty, and although the succeeding provisions create some confusion and difficulty, they do not contradict the previous express devise. *Horne v. Barton* is distinguishable; that was the case of an executory trust, in which a court of equity takes a greater latitude than a court of law can admit in the construction of a legal devise.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—This was a case sent by the Master of the Rolls for the opinion of this Court; and the question was what construction was to be put upon the words made use of by the testator in the residuary devise contained in his will. There is no construction of the will which does not present much doubt and difficulty; but on the whole we think that it is the most rational construction, and that which comes nearest to the intention of the testator to consider the word “issue” as meaning children: the interpretation to be given to the words “their lawful issue respectively in tail general,” will be to construe them as meaning “their children lawfully begot-

ten." The result therefore is, that the sons and daughters take estates for life, with remainders to their children in tail by purchase as tenants in common, with cross remainders among them. We shall accordingly so certify our opinion to the Master of the Rolls.

Book of Pleas,
1838.

CURSHAM
or
NEWLAND.

A certificate was sent accordingly.

HEMINGWAY v. HAMILTON and Others.

ASSUMPSIT.—The first count of the declaration stated, that the plaintiff, on the 25th January, 1837, at the special instance and request of the defendants, agreed with the defendants to sail for them to Bonny River, on the coast of Africa, the first fair wind, and purchase for them 1200 tons of palm oil, cargoes to be provided by River, and purchase for them 1200 tons of palm oil, and ship it on board of their ships; that he would faithfully abide by their instructions to him, and would not aid or assist, directly or indirectly, the trading of any other ships or cargoes, by giving advice for the purpose of selling or bartering the same for palm oil, except so far as it might be rendered necessary for carrying the agreement into effect, and for the defendants' benefit, under the penalty of the forfeiture of his commission and wages. The defendants pleaded, that they were merchants in Liverpool, trading to the coast of Africa, and having trading establishments there; that they were desirous of sending out an agent there, to purchase and ship for them palm oil, and to conduct exclusively their trading and take charge of their property there, which the plaintiff and one J. H. and one J. A. well knew; and that the plaintiff and those persons, contriving to defraud the defendants, fraudulently conspired and agreed together that J. H. and J. A. should fit out two ships for the coast of Africa, and that the plaintiff should apply for and obtain the employment as agent for the defendants, and under colour and by means of such employment, and without the defendants' knowledge, and in fraud of his agreement with them, should assist and advise the said J. H. and J. A. in the trading of their ships, and the selling and bartering the cargoes for palm oil, and should assist the said ships by employing the workmen and servants of the defendants upon them, and endeavour to establish a trade for the said J. H. and J. A., in competition with and to the prejudice of the defendants; that, in pursuance of such conspiracy, they fitted out ships, and the plaintiff obtained the employment as agent, and induced the defendants to enter into the agreement in the declaration mentioned, for the purposes before stated; and that he did, under colour of his employment, and without the defendants' knowledge, and in fraud of his agreement, aid and assist J. H. and J. A. in the trading of their ships, and supplied them with palm oil, by employing the defendants' workmen and servants upon them, and in other ways assisted them in the bartering their cargoes for palm oil, and in establishing a rival trade to the defendants.' Replication, *de injuriâ*:—*Held*, that the plea was bad; for that the mere conspiracy to enter into the agreement, for the purposes therein stated, could not vitiate the agreement itself when carried into effect; and the actual aiding and assisting of J. H. and J. A., which was charged against the plaintiff, was not such as was specified in the agreement. *And*, that if the plea had been good, as shewing such acts of aiding and assisting as were in breach of the agreement, the replication *de injuriâ* was good also.

CASES IN THE EXCHEQUER,

... and ship or cause to be shipped the same oil in
... River on board of their ship or ships, to be pro-
... by them for the purpose of receiving the same; and
... the plaintiff would truly and faithfully abide by their
... instructions to him, and account to them for every thing
... trusted to his charge; and the plaintiff further agreed
... that he would not aid or assist, either directly or indirectly,
... in any way whatever, the trading of any other ship or
... ships, cargo or cargoes, by giving advice for the purpose of
... selling or bartering the same for any palm oil or any other
... African produce, save and except so far as the same might
... be rendered necessary for carrying the said agreement into
... effect, and for the defendants' benefit and advantage, under
... the penalty of the forfeiture of his commission and wages;
... and in consideration of the defendants paying him for
... each net ton of palm oil purchased in Bonny, and delivered
... to them in Liverpool, the sum of 2*l.* 10*s.* per ton, and
... should he purchase more than 1200 tons with the cargoes,
... to have 3*l.* per ton on every net ton he delivered to them
... in Liverpool above 1200 tons; and the defendants were
... also to allow and pay to him, over and above the said com-
... mission and wages, at the rate of 5*l.* per month from the time
... of his sailing to his return to England; also a commission
... of ten per cent on all ivory, dollars, or gold he might buy
... and deliver to them in Liverpool. The agreement con-
... tained other stipulations which it is not necessary to
... notice; but in conclusion, the defendants agreed "to
... abide by the foregoing and fulfil all and every of the same,
... under the penalty of 1500*l.* stipulated damages, which
... penalty should not prevent the plaintiff recovering all his
... wages and commission." The declaration then, after aver-
... ring mutual promises, and alleging performance on the part
... of the plaintiff of the agreement in its terms, stated that
... on the 1st day of March, 1838, he, the plaintiff, returned
... to England, and then delivered to the defendants in
... Liverpool aforesaid, who then accepted the same, a certain

large quantity, to wit, 1040 net tons of palm oil, purchased by him in Bonny as aforesaid; by reason whereof, and by virtue of the said agreement, the defendants became and were liable to pay to him the said sum of 2l. 10s. commission upon each net ton of the palm oil so purchased and delivered as aforesaid, and amounting to a large sum, to wit, the sum of 2600l., and a certain other large sum, to wit, the sum of 65l., for wages at the rate of 5l. per month from the time of his sailing to the time of his return to England, being a period of thirteen months. The breach was then assigned in nonpayment of these several sums, and also of the said sum of 1500l. stipulated damages. There was also a count on an account stated.

Erech. of Pleas,
1838.

HEMINGWAY
v.
HAMILTON.

Seventh plea (to the first count). That heretofore, and before and at the time of the making of the said agreement in the first count mentioned, the defendants were merchants carrying on trade and business in co-partnership in Liverpool, and trading to certain parts beyond the seas, to wit, the said coast of Africa, where they had, during all the time aforesaid, trading establishments; and the defendants, during the course of such trading as aforesaid, had made and acquired, and were acquiring, great gains and profits by their said trade; and the defendants, for the purpose of such trading, shortly before the time of making the said agreement, to wit, on the 21st of January, 1837, were desirous of sending, and intended to send out to the coast of Africa aforesaid, in their employment, some person as their agent at the coast of Africa aforesaid, to purchase for the defendants there, and to ship from thence by ships of the defendants, to be then fitted out and equipped by the defendants for that purpose, certain large quantities of palm oil, and to conduct and attend exclusively to the trading and business of the defendants at the coast of Africa aforesaid, and as such agent to have and take charge of divers large quantities of property of them the defendants for the defendants at

Each of Pleas,
1838.

HEMINGWAY
v.
HAMILTON.

the said coast of Africa : of which said desire and intention of the defendants, and of all other the premises in this plea mentioned, the plaintiff, and one James Hemingway and John Fouldes Agitt, before and at the time of the making the said agreement in the first count mentioned, and before and at the time of the conspiracy and combination hereinafter mentioned, had notice and well knew the same. And the defendants further say, that shortly before the making of the said agreement in the said first count mentioned, to wit, on the said 21st day of January, in the year of our Lord 1837, the plaintiff, and the said James Hemingway, and John Fouldes Agitt, well knowing the premises in this plea mentioned, and contriving to deceive and defraud the defendants, did falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree together, that the said James Hemingway and John Fouldes Agitt should fit out and equip divers, to wit, two ships, for the coast of Africa aforesaid, and that the said plaintiff should apply for and obtain the said employment as such agent as aforesaid for and on behalf of the said defendants, and should enter into such agreement with the said defendants as in the said first count in that behalf mentioned, and that the plaintiff should, under such colour and pretence of such employment, and by the means and opportunities which he might have and derive therefrom, and without the knowledge and consent of the said defendants, and in fraud of such agreement as aforesaid, assist and advise the said James Hemingway and John Fouldes Agitt in and about the trading of the said ships, and the selling and bartering the cargoes of the said ships for palm oil, and supply the said ships of the said James Hemingway and John Fouldes Agitt with palm oil of and belonging to the defendants, and aid and assist the said ships of the said James Hemingway and John Fouldes Agitt, by employing the workmen and servants of the said defendants in and

about the said last mentioned ships, and endeavour to establish, and aid and assist in establishing, for the said James Hemingway and J. F. Agitt, at the coast of Africa aforesaid, a trade in competition with and to the prejudice of the said defendants and their said trade. And the defendants further say, that afterwards, to wit, on the day and year last aforesaid, the said James Hemingway and J. F. Agitt did, in pursuance of the said fraudulent conspiracy and combination, fit out and equip the said two last mentioned ships to the coast of Africa aforesaid, and the plaintiff, to wit, on the day and year in the said first count in that behalf mentioned, did apply for and obtain the said employment, and did, to wit, then fraudulently, and in pursuance and for the purposes of the said fraudulent conspiracy, combination, confederacy, and agreement, and without the defendants, or any of them, having any knowledge or notice thereof, enter and induce the defendants to enter into the said agreement in the first count mentioned, in order that he might, under colour and pretence of such employment, and by the means and opportunities which he might derive and have therefrom, and without the knowledge or consent of the defendants, and in fraud of the said agreement, aid and assist the said James Hemingway and J. F. Agitt in and about the trading of the said ships, and the selling and bartering of the said cargoes for palm oil, and that he might falsely and fraudulently, and against and in fraud of such employment and agreement, and by such means and opportunities as aforesaid, supply the said ships of the said James Hemingway and J. F. Agitt with palm oil of and belonging to the defendants, and aid and assist the said ships of the said James Hemingway and J. F. Agitt by employing the workmen and servants of the defendants in and about the last mentioned ships, and that he might fraudulently and by such means and opportunities as aforesaid, so en-

Exch. of Pleas
1828.

HEMINGWAY
&
HAMILTON.

Exch. of Pleas,
1838.

HEMINGWAY
v.
HAMILTON.

deavour to establish and aid and assist in establishing for the said James Hemingway and J. F. Agitt such trade as aforesaid, in competition with and to the prejudice of the defendants, and their said trade as aforesaid. And the defendants further say, that the said entering into the said agreement in this plea mentioned is the same agreeing and promising in the first count mentioned. And the defendants further say, that the plaintiff did afterwards, to wit, on the 14th day of June, 1837, under colour and pretence of such employment, and without the knowledge or consent of the said defendants, and in fraud of such agreement and by such means and opportunities as aforesaid, aid and assist the said James Hemingway and J. F. Agitt in and about the trading of the said ships, and the selling and bartering of the said cargoes of palm oil, and did, to wit, then falsely and fraudulently, and against and in breach of such employments and agreement, and by such means and opportunities as aforesaid, supply the said last mentioned ships with palm oil of and belonging to the defendants, and did, to wit, then aid and assist the said last mentioned ships by, to wit, then employing the workmen and servants of the defendants in and about such ships, and did, to wit, in divers and very many other ways aid and assist and advise the said James Hemingway and J. F. Agitt in and about the trading of the said ships, and in and about the selling and bartering the said cargoes for palm oil, falsely and fraudulently, and against and in breach of the said employment and agreement, and did, during the whole course of the said employment, fraudulently and by such means and opportunities as aforesaid, endeavour to establish and aid and assist in establishing at the Coast of Africa, for the said James Hemingway and J. F. Agitt, such trade as aforesaid, in competition with, and to the prejudice of the defendants, and their said trade as aforesaid: and so the defendants say that the said agreement of the said

first count mentioned, was and is wholly fraudulent and void and of no effect.—Verification.

Exch. of Pleas,
1838.

HEMINGWAY
v.
HAMILTON.

Replication, de injuriâ: to which there was a special demurrer, on the ground that the replication de injuriâ could not be replied to a plea like this, which did not consist of matter of excuse, but of matter of going to avoid the supposed contract in the first count mentioned, and to shew that it never was a binding or valid contract, but was void in law on the ground of the fraud and conspiracy alleged in the plea. Joinder in demurrer.

Crompton, in support of the demurrer—The application of the replication de injuriâ to cases of assumpsit is to be governed by the same rules which applied to the actions in which it used to be pleaded before the new rules: that is, the plea to which it is replied must be mere matter of excuse for the breach complained of, not matter going to destroy the ground on which the action is founded, whether by *denying* it or *avoiding* it: *Whittaker v. Mason* (a), *Crisp v. Griffiths* (b), *Griffin v. Yates* (c), *Isaac v. Farrar* (d), *Parker v. Riley* (e), [*Parke*, B.—This appears to be a kind of double plea—that the contract was entered into by a conspiracy, and that it was afterwards violated.] The latter part may be rejected as surplusage. If the plaintiff had traversed the conspiracy, the rest of the plea would have been immaterial. The latter part of the plea would be no answer to the action, because the defendants do not bring themselves within the terms of the contract, and do not intend to do so. But the fraudulent intention to enter into the contract, for the purpose of sending out the plaintiff, not in truth as the servant of the defendants, but really to set up a hostile establishment, goes to avoid the contract ab

(a) 2 Bing. N. C. 359; 2 Scott, 845.

567.

(b) 2 C. M. & R. 159.

(c) 2 Bing. N. C. 579; 2 Scott,

(d) 1 M. & W. 65.

(e) 3 M. & W. 230.

Exch. of Pleas,
1838.

HEMINGWAY
v.
HAMILTON.

initio. [*Parke, B.*—There is no misrepresentation of any existing fact, but only an intention at the time of the contract to depart from it, which intention is not alleged to have been carried into effect. That does not vitiate the contract.] The fraudulent design taints the whole contract. If he goes out, and renders the defendants services, he may recover on a new contract for a quantum meruit, but not on the contract so tainted.

LORD ABINGER, C. B.—Suppose a man contracts in writing to sell goods at a certain price, and afterwards delivers them, could the buyer plead that at the time of the contract, the seller fraudulently intended not to deliver them, but to dispose of them otherwise? The plea is clearly bad.

PARKE, B.—If the plea sufficiently shews that there was a breach of the condition entered into by the plaintiff, then the replication is good, because the plea is only matter of excuse for the nonperformance of the contract on the defendants' part. On the other hand, if it does not, then the plea is bad, because it shews no actual fraud, but only an *intended* breach of the agreement: if the plaintiff does not in fact commit it, the agreement is not broken; if he does, he forfeits his remuneration.

The other Barons concurring,

Judgment for the plaintiff.

Cresswell appeared to argue for the plaintiff.

*Book of Pleas,
1833.*

JONES and Another v. SENIOR.

THE first count of the declaration was on a bill of exchange for 300*l.*, dated 20th December, 1834, drawn by Joseph Maybury, by procuration of John Maybury, upon the defendant, by the name and style of John Senior & Co., iron merchants, Liverpool, payable to the order of the said Joseph Maybury two months after date, and accepted by the defendant, and indorsed by Joseph Maybury, by procuration of John Maybury, to the plaintiffs. The second count was on another bill for 220*l.*, dated 24th December, 1834, drawn by the said Joseph Maybury, by procuration of Joseph Maybury, jun., and in other respects similar to the former.

Plea, that before and at the time of the accepting of the said bills in the declaration mentioned, the defendant was indebted to the said Joseph Maybury in the sum of 807*l.*, and that the same bills respectively were accepted on account and in respect of 520*l.*, parcel of the same debts; and that after the accepting, as in the declaration mentioned, of the said bills, and before the said bills or either of them became due and payable, to wit, on the 10th February, 1835, he, the defendant, was also indebted to divers other persons [naming them] respectively in divers sums of money, and then was embarrassed in his circumstances, and unable to pay his debts in full: and

To a declaration on bills of exchange for 520*l.*, drawn by M. upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded, that before the accepting of the bills he was indebted to M. in a larger amount, and that they were accepted on account of 520*l.*, part of the debt; that after the acceptance, and before the bills became due, the defendant was also indebted to other persons named, and was embarrassed in his circumstances, and unable to pay his debts in full; and thereupon, by an instrument in writing made between M. and the said

other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7*s.* in the pound on their respective debts, payable on a day named (which was after the bills became due). The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that afterwards, and before the commencement of this suit, M. paid to the plaintiffs, and they received from him, divers sums of money, amounting to a sum sufficient to satisfy all consideration whatever for or in respect of the indorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs in respect of the bills or otherwise, and all claims and demands of the plaintiffs in respect of the bills or otherwise on M., in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them or otherwise; and that the plaintiffs then became, and thenceforth continued, holders of the bills without consideration, and in fraud of the defendant and his creditors. Replication, *de injuria*:—*Held*, on demurrer, that the replication was bad; for that the plea amounted to matter of discharge, not of excuse.

Exch. of Pleas,
1838.

JONES
v.
SENIOR.

thereupon the defendant, being so indebted as aforesaid, by a certain instrument in writing then made by, between, and among the said Joseph Maybury and the said several other persons of the first part, and the defendant of the second part, and which said instrument was then subscribed as well by the said other persons who then respectively set thereunder and opposite to their respective names, the amounts of their respective debts, as by the said Joseph Maybury, who then set thereunder and opposite to his name the said sum of 807*l.*; reciting that the defendant was indebted to the several persons parties thereto of the first part, in the several sums of money thereunder set opposite to their respective names, and that a proposal had been made by the defendant to the said several parties, and agreed to by them, that the defendant should, on or before the 1st d y of March then next, pay to the said several creditors, in manner thereafter mentioned, a composition of 7*s.* on the amount of their said respective debts, and that the defendant should relinquish and transfer to and for the benefit of the said creditors, certain claims of him the defendant upon certain mercantile houses in Great Britain and in parts abroad; which composition of 7*s.* in the pound, and transfer of such claims, were to be in full satisfaction and discharge of the said several debts owing to the said creditors, parties thereto of the first part, who had agreed, in consideration thereof, to enter into and execute that instrument; and further reciting, that by an indenture bearing even date therewith, the defendant had relinquished and transferred the said several claims to the said creditors, parties thereto of the first part: [the plea then proceeded to set out the composition deed at length, whereby the creditors, parties to it, agreed to receive a composition of 7*s.* in the pound to be paid on the 1st March, viz. 5*s.* in cash, and 2*s.* by the defendant's acceptances at six months, in full discharge of their several debts.] And the defendant further said,

Exch. of Pleas,
1838.

JONES
v.
SENIOR.

that after the making of the said instrument in writing, and before the said 1st of March, 1835, he, the defendant, at the instance and request of the said Joseph Maybury, paid to one W. Fellowes, for the said Joseph Maybury, 5s. in the pound on the debt of the said Joseph Maybury, to wit, on the said sum of 807*l.*, to wit, the sum of 201*l.* 15*s.*; and then and before the said 1st of March, to wit, on the 10th of February, 1835, at the like request, also delivered to the said W. Fellowes, for the said Joseph Maybury, his the defendant's acceptance, with a sufficient personal guarantee for the due payment thereof, at six months' date, for the amount of 2*s.* in the pound on the said debt of the said Joseph Maybury, to wit, for the sum of 80*l.* 14*s.*; whereof the said Joseph Maybury then had notice, and then was requested to deliver up to the defendant the said two bills in the declaration mentioned; and thereupon the said Joseph Maybury then requested, and the defendant, at the request of the said Joseph Maybury, then agreed, that the said Joseph Maybury should have further time to procure and deliver up to the defendant the same two bills. [The plea then averred payment of the composition according to the terms of the deed to the other subscribing creditors:] of all which premises the plaintiffs then had notice. And the defendant avers, that afterwards, and long before the commencement of this suit, the said Joseph Maybury paid to the plaintiffs, and the plaintiffs then received from and on account of the said Joseph Maybury, divers sums of money, in the whole amounting to a sum sufficient to satisfy and discharge all consideration whatever for or in respect of the said indorsement of the said bills in the declaration mentioned respectively, and all sums of money then due from or by the said Joseph Maybury to the plaintiffs in respect of the said bills or either of them, or otherwise however, and all claims and demands whatsoever of the plaintiffs in respect of the said bills or either of them, or otherwise, on the said

Each. of Pleas,
1838.

HEMINGWAY
v.
HAMILTON.

the said coast of Africa : of which said desire and intention of the defendants, and of all other the premises in this plea mentioned, the plaintiff, and one James Hemingway and John Fouldes Agitt, before and at the time of the making the said agreement in the first count mentioned, and before and at the time of the conspiracy and combination hereinafter mentioned, had notice and well knew the same. And the defendants further say, that shortly before the making of the said agreement in the said first count mentioned, to wit, on the said 21st day of January, in the year of our Lord 1837, the plaintiff, and the said James Hemingway, and John Fouldes Agitt, well knowing the premises in this plea mentioned, and contriving to deceive and defraud the defendants, did falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree together, that the said James Hemingway and John Fouldes Agitt should fit out and equip divers, to wit, two ships, for the coast of Africa aforesaid, and that the said plaintiff should apply for and obtain the said employment as such agent as aforesaid for and on behalf of the said defendants, and should enter into such agreement with the said defendants as in the said first count in that behalf mentioned, and that the plaintiff should, under such colour and pretence of such employment, and by the means and opportunities which he might have and derive therefrom, and without the knowledge and consent of the said defendants, and in fraud of such agreement as aforesaid, assist and advise the said James Hemingway and John Fouldes Agitt in and about the trading of the said ships, and the selling and bartering the cargoes of the said ships for palm oil, and supply the said ships of the said James Hemingway and John Fouldes Agitt with palm oil of and belonging to the defendants, and aid and assist the said ships of the said James Hemingway and John Fouldes Agitt, by employing the workmen and servants of the said defendants in and

about the said last mentioned ships, and endeavour to establish, and aid and assist in establishing, for the said James Hemingway and J. F. Agitt, at the coast of Africa aforesaid, a trade in competition with and to the prejudice of the said defendants and their said trade. And the defendants further say, that afterwards, to wit, on the day and year last aforesaid, the said James Hemingway and J. F. Agitt did, in pursuance of the said fraudulent conspiracy and combination, fit out and equip the said two last mentioned ships to the coast of Africa aforesaid, and the plaintiff, to wit, on the day and year in the said first count in that behalf mentioned, did apply for and obtain the said employment, and did, to wit, then fraudulently, and in pursuance and for the purposes of the said fraudulent conspiracy, combination, confederacy, and agreement, and without the defendants, or any of them, having any knowledge or notice thereof, enter and induce the defendants to enter into the said agreement in the first count mentioned, in order that he might, under colour and pretence of such employment, and by the means and opportunities which he might derive and have therefrom, and without the knowledge or consent of the defendants, and in fraud of the said agreement, aid and assist the said James Hemingway and J. F. Agitt in and about the trading of the said ships, and the selling and bartering of the said cargoes for palm oil, and that he might falsely and fraudulently, and against and in fraud of such employment and agreement, and by such means and opportunities as aforesaid, supply the said ships of the said James Hemingway and J. F. Agitt with palm oil of and belonging to the defendants, and aid and assist the said ships of the said James Hemingway and J. F. Agitt by employing the workmen and servants of the defendants in and about the last mentioned ships, and that he might fraudulently and by such means and opportunities as aforesaid, so en-

East. of Pleas
1822.

HEMINGWAY
HAMILTON.

Exch. of Pleas,
1838.

HEMINGWAY
v.
HAMILTON.

deavour to establish and aid and assist in establishing for the said James Hemingway and J. F. Agitt such trade as aforesaid, in competition with and to the prejudice of the defendants, and their said trade as aforesaid. And the defendants further say, that the said entering into the said agreement in this plea mentioned is the same agreeing and promising in the first count mentioned. And the defendants further say, that the plaintiff did afterwards, to wit, on the 14th day of June, 1837, under colour and pretence of such employment, and without the knowledge or consent of the said defendants, and in fraud of such agreement and by such means and opportunities as aforesaid, aid and assist the said James Hemingway and J. F. Agitt in and about the trading of the said ships, and the selling and bartering of the said cargoes of palm oil, and did, to wit, then falsely and fraudulently, and against and in breach of such employments and agreement, and by such means and opportunities as aforesaid, supply the said last mentioned ships with palm oil of and belonging to the defendants, and did, to wit, then aid and assist the said last mentioned ships by, to wit, then employing the workmen and servants of the defendants in and about such ships, and did, to wit, in divers and very many other ways aid and assist and advise the said James Hemingway and J. F. Agitt in and about the trading of the said ships, and in and about the selling and bartering the said cargoes for palm oil, falsely and fraudulently, and against and in breach of the said employment and agreement, and did, during the whole course of the said employment, fraudulently and by such means and opportunities as aforesaid, endeavour to establish and aid and assist in establishing at the Coast of Africa, for the said James Hemingway and J. F. Agitt, such trade as aforesaid, in competition with, and to the prejudice of the defendants, and their said trade as aforesaid: and so the defendants say that the said agreement of the said

first count mentioned, was and is wholly fraudulent and void and of no effect.—Verification.

Replication, *de injuriâ*: to which there was a special demurrer, on the ground that the replication *de injuriâ* could not be replied to a plea like this, which did not consist of matter of excuse, but of matter of going to avoid the supposed contract in the first count mentioned, and to shew that it never was a binding or valid contract, but was void in law on the ground of the fraud and conspiracy alleged in the plea. Joinder in demurrer.

Exch. of Pleas,
1838.

HEMINGWAY
v.
HAMILTON.

Crompton, in support of the demurrer—The application of the replication *de injuriâ* to cases of *assumpsit* is to be governed by the same rules which applied to the actions in which it used to be pleaded before the new rules: that is, the plea to which it is replied must be mere matter of excuse for the breach complained of, not matter going to destroy the ground on which the action is founded, whether by *denying* it or *avoiding* it: *Whittaker v. Mason* (a), *Crisp v. Griffiths* (b), *Griffin v. Yates* (c), *Isaac v. Farrar* (d), *Parker v. Riley* (e), [*Parke, B.*—This appears to be a kind of double plea—that the contract was entered into by a conspiracy, and that it was afterwards violated.] The latter part may be rejected as surplusage. If the plaintiff had traversed the conspiracy, the rest of the plea would have been immaterial. The latter part of the plea would be no answer to the action, because the defendants do not bring themselves within the terms of the contract, and do not intend to do so. But the fraudulent intention to enter into the contract, for the purpose of sending out the plaintiff, not in truth as the servant of the defendants, but really to set up a hostile establishment, goes to avoid the contract ab

(a) 2 Bing. N. C. 359; 2 Scott, 845.
567.

(b) 2 C. M. & R. 159.

(c) 2 Bing. N. C. 579; 2 Scott,

(d) 1 M. & W. 65.

(e) 3 M. & W. 230.

Exch. of Pleas,
1858.

HEMINGWAY
v.
HAMILTON.

initio. [*Parke, B.*—There is no misrepresentation of any existing fact, but only an intention at the time of the contract to depart from it, which intention is not alleged to have been carried into effect. That does not vitiate the contract.] The fraudulent design taints the whole contract. If he goes out, and renders the defendants services, he may recover on a new contract for a quantum meruit, but not on the contract so tainted.

LORD ABINGER, C. B.—Suppose a man contracts in writing to sell goods at a certain price, and afterwards delivers them, could the buyer plead that at the time of the contract, the seller fraudulently intended not to deliver them, but to dispose of them otherwise? The plea is clearly bad.

PARKE, B.—If the plea sufficiently shews that there was a breach of the condition entered into by the plaintiff, then the replication is good, because the plea is only matter of excuse for the nonperformance of the contract on the defendants' part. On the other hand, if it does not, then the plea is bad, because it shews no actual fraud, but only an *intended* breach of the agreement: if the plaintiff does not in fact commit it, the agreement is not broken; if he does, he forfeits his remuneration.

The other Barons concurring,

Judgment for the plaintiff.

Cresswell appeared to argue for the plaintiff.

Each of Pleas
1838.

JONES and Another v. SENIOR.

THE first count of the declaration was on a bill of exchange for 300*l.*, dated 20th December, 1834, drawn by Joseph Maybury, by procuration of John Maybury, upon the defendant, by the name and style of John Senior & Co., iron merchants, Liverpool, payable to the order of the said Joseph Maybury two months after date, and accepted by the defendant, and indorsed by Joseph Maybury, by procuration of John Maybury, to the plaintiffs. The second count was on another bill for 220*l.*, dated 24th December, 1834, drawn by the said Joseph Maybury, by procuration of Joseph Maybury, jun., and in other respects similar to the former.

Plea, that before and at the time of the accepting of the said bills in the declaration mentioned, the defendant was indebted to the said Joseph Maybury in the sum of 807*l.*, and that the same bills respectively were accepted on account and in respect of 520*l.*, parcel of the same debts; and that after the accepting, as in the declaration mentioned, of the said bills, and before the said bills or either of them became due and payable, to wit, on the 10th February, 1835, he, the defendant, was also indebted to divers other persons [naming them] respectively in divers sums of money, and then was embarrassed in his circumstances, and unable to pay his debts in full: and

To a declaration on bills of exchange for 520*l.*, drawn by M. upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded, that before the accepting of the bills he was indebted to M. in a larger amount, and that they were accepted on account of 520*l.*, part of the debt; that after the acceptance, and before the bills became due, the defendant was also indebted to other persons named, and was embarrassed in his circumstances, and unable to pay his debts in full; and thereupon, by an instrument in writing made between M. and the said

other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7*s.* in the pound on their respective debts, payable on a day named (which was after the bills became due). The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that afterwards, and before the commencement of this suit, M. paid to the plaintiffs, and they received from him, divers sums of money, amounting to a sum sufficient to satisfy all consideration whatever for or in respect of the indorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs in respect of the bills or otherwise, and all claims and demands of the plaintiffs in respect of the bills or otherwise on M., in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them or otherwise; and that the plaintiffs then became, and thenceforth continued, holders of the bills without consideration, and in fraud of the defendant and his creditors. Replication, *de injuriâ*:—*Held*, on demurrer, that the replication was bad; for that the plea amounted to matter of discharge, not of excuse.

Exch. of Pleas,
1838.

JONES
v.
SENIOR.

thereupon the defendant, being so indebted as aforesaid, by a certain instrument in writing then made by, between, and among the said Joseph Maybury and the said several other persons of the first part, and the defendant of the second part, and which said instrument was then subscribed as well by the said other persons who then respectively set thereunder and opposite to their respective names, the amounts of their respective debts, as by the said Joseph Maybury, who then set thereunder and opposite to his name the said sum of 807*l.*; reciting that the defendant was indebted to the several persons parties thereto of the first part, in the several sums of money thereunder set opposite to their respective names, and that a proposal had been made by the defendant to the said several parties, and agreed to by them, that the defendant should, on or before the 1st d y of March then next, pay to the said several creditors, in manner thereafter mentioned, a composition of 7*s.* on the amount of their said respective debts, and that the defendant should relinquish and transfer to and for the benefit of the said creditors, certain claims of him the defendant upon certain mercantile houses in Great Britain and in parts abroad; which composition of 7*s.* in the pound, and transfer of such claims, were to be in full satisfaction and discharge of the said several debts owing to the said creditors, parties thereto of the first part, who had agreed, in consideration thereof, to enter into and execute that instrument; and further reciting, that by an indenture bearing even date therewith, the defendant had relinquished and transferred the said several claims to the said creditors, parties thereto of the first part: [the plea then proceeded to set out the composition deed at length, whereby the creditors, parties to it, agreed to receive a composition of 7*s.* in the pound to be paid on the 1st March, viz. 5*s.* in cash, and 2*s.* by the defendant's acceptances at six months, in full discharge of their several debts.] And the defendant further said,

that after the making of the said instrument in writing, and before the said 1st of March, 1835, he, the defendant, at the instance and request of the said Joseph Maybury, paid to one W. Fellowes, for the said Joseph Maybury, 5s. in the pound on the debt of the said Joseph Maybury, to wit, on the said sum of 807*l.*, to wit, the sum of 201*l.* 15*s.*; and then and before the said 1st of March, to wit, on the 10th of February, 1835, at the like request, also delivered to the said W. Fellowes, for the said Joseph Maybury, his the defendant's acceptance, with a sufficient personal guarantee for the due payment thereof, at six months' date, for the amount of 2*s.* in the pound on the said debt of the said Joseph Maybury, to wit, for the sum of 80*l.* 14*s.*; whereof the said Joseph Maybury then had notice, and then was requested to deliver up to the defendant the said two bills in the declaration mentioned; and thereupon the said Joseph Maybury then requested, and the defendant, at the request of the said Joseph Maybury, then agreed, that the said Joseph Maybury should have further time to procure and deliver up to the defendant the same two bills. [The plea then averred payment of the composition according to the terms of the deed to the other subscribing creditors:] of all which premises the plaintiffs then had notice. And the defendant avers, that afterwards, and long before the commencement of this suit, the said Joseph Maybury paid to the plaintiffs, and the plaintiffs then received from and on account of the said Joseph Maybury, divers sums of money, in the whole amounting to a sum sufficient to satisfy and discharge all consideration whatever for or in respect of the said indorsement of the said bills in the declaration mentioned respectively, and all sums of money then due from or by the said Joseph Maybury to the plaintiffs in respect of the said bills or either of them, or otherwise however, and all claims and demands whatsoever of the plaintiffs in respect of the said bills or either of them, or otherwise, on the said

Exch. of Pleas,
1838.

JONES
v.
SENIOR.

Book of Pleas,
1838.

JONES
v.
SENIOR.

Joseph Maybury, to wit, the sum of 2000*l.*, in full satisfaction and discharge of the same bills, and all claim and demand whatsoever in respect of them or either of them, or otherwise ; and so the defendant says, that the plaintiffs then became, and thenceforth continued to be, and at the time of the commencement of this suit were, the holders of the same bills respectively, without any consideration whatsoever in respect of their being holders of the same or either of them, or to entitle them to the security or benefit thereof or of either of them in anywise, and in fraud of the defendant and his said creditors.—Verification.

Replication, *de injuriâ*.

Special demurrer, and joinder.

The points set down for argument were as follows :—

For the plaintiffs : That the plea is ill, because it does not allege that Joseph Maybury was the holder of the bills when the instrument of composition was entered into ; nor that the debt was discharged by the composition ; nor that the plaintiffs were otherwise than *bonâ fide* holders for value : and because it must be taken that the payments by Maybury to the plaintiffs were made before the bills fell due ; and because the plea does not allege that Maybury paid the bills, but merely that he paid the plaintiffs monies sufficient to pay them ; and because it alleges an insufficient excuse for the non-payment of the bills to the plaintiffs.

For the defendant : That the replication is ill, because it purports to deny the excuse set up by the plea, whereas no *excuse* for nonpayment of the bills when due is alleged, though the plea shews matter in *discharge* of an undenied liability, and breach of promise to pay according to the tenor and effect of the bills and indorsements : because it assumes that the material matters of the plea are merely in excuse, although those matters do not, as pleaded, appear, nor are by any matters alleged in the replication shewn, to be merely matters in excuse : because the de-

defendant has by his plea shown and claimed an interest in the bills on which the action is founded: and because the replication is double and multifarious.

East. of Pleas,
1838.

JONES
v.
SENIOR.

J. Henderson, in support of the demurrer.—The replication is ill. Unless the plea consist merely of matter of excuse for the nonperformance of the promise, the replication de injuriâ is not only informal but insensible. That law was established in *Crogate's case* (a), and is fully recognised by all the subsequent authorities. But this plea contains matter, not of excuse, but of *discharge*. The defendant in effect says, "You cannot recover, not because the bills were not paid when due, but because you have been discharged from your right to sue by matters subsequent." [*Parke, B.*—One part of the plea seems to be matter of excuse, and another of accord and satisfaction. Would the plea be good if all about the composition were struck out?] It may be admitted that it would not, because the defendant is bound to discharge the drawer as well as the plaintiffs. [*Parke, B.*—As I read the plea, it appears that the composition deed was entered into before the bills fell due: then it operates as an excuse for nonpayment when due.] Not of itself: it was necessary to aver a compliance with the terms of it; and that may have been subsequent to the bills becoming due. It is indeed by no means clear that the composition deed does not of itself amount to matter of *discharge*; but it clearly is so as to the indorsees. It is not like the case of *Isaac v. Farrer* (b), where the plea merely *excused* the nonpayment, on the ground of want of consideration for the defendant's indorsement. This plea sets up no excuse for nonpayment, but only matter of subsequent discharge. The case more resembles that of *Crisp v. Griffiths* (c). The defendant is certainly bound to shew that the plaintiffs had no right to

(a) 8 Co. 66.

(b) 1 M. & W. 65.

(c) 2 C. M. & R. 159.

Exch. of Pleas,
1838.

JONES
v.
SENIOR.

sue, not only in respect of any beneficial interest in themselves, but also in right of the interest of the drawer. Here the drawer could not sue, because he has entered into the composition; nor the plaintiffs, because the drawer has satisfied them. The plea might, perhaps, be matter of excuse merely to an action by the drawer; but it is matter of discharge as against the plaintiffs. And if it be doubtful which it is, the plaintiffs cannot construe it in the former sense, so as to entitle them to use this general traverse. The plea in effect admits that when the bills fell due the defendant was answerable in law, and yet it does not shew any matter *in excuse* of the breach of promise by nonpayment. And it expressly states that the payment by Maybury to the plaintiffs was made *in satisfaction and discharge* of all their claim in respect of the bills, which could not be until a complete cause of action had accrued to them; that is, not until after the bills fell due.

Channell, contra.—The replication is good. It is entirely a question whether the plea consists of matter of excuse or not; it is submitted that it does, since it shews a cesser of all consideration on the part of the plaintiffs as to the bills. As far as regards the matter relating to the composition deed, that is clearly in excuse only. Then the defendant avails himself of subsequent matter to shew that the cause of action, which had vested, has ceased and discontinued. If the payment were made while the bills were still running, that would be clearly matter of excuse; *Reynolds v. Blackburn* (a): but it is said that it does not appear that the payment by Maybury was before the bills became due. If that be an important distinction, it may be doubted whether the plea is not bad for not stating the fact more explicitly. But suppose the payment was made after the bills fell due: does a payment by the drawer,

(a) 6 Dowl. P. C. 19.

after the bill is due, discharge the acceptor as against the holder? The holder might, nevertheless, go on against the acceptor for nominal damages for his breach of contract. [*Parke, B.*—The plea says, not only that Maybury paid the plaintiffs, but that they received the money in satisfaction of all their claims and demands whatsoever in respect of the bills.] Of all their claims and demands *on Maybury* in respect of the bills. It appears to have been considered that where the effect of the plea is to destroy the consideration, or to shew that none ever existed, that is matter of excuse, and the replication *de injuriâ* is good; *Isaac v. Farrar*. [*Parke, B.*—That was the case of a defect of consideration before the bill became due.] Here the composition with the drawer is before the bills become due; but it is then necessary that the plea should go further, and destroy the consideration; and, accordingly, it goes on to state the payments, and that “the plaintiffs became and were, and from thenceforth continued to be, and at the time of the commencement of the suit were, holders of the bills without any consideration whatever for or in respect of their being holders of the same, and in fraud of the defendant.” The plea has a double object; first, to destroy the consideration as between the defendant and Maybury, and then to shew that no consideration exists as between Maybury and the plaintiffs.

Esch. of Pleas
1838.

JONES

SENIOR.

PARKE, B.—This is in substance no more than a plea of accord and satisfaction, by matter which has arisen since the bills became due. The meaning of the plea is, that since the bills became due Maybury has paid the plaintiffs the full amount of what was due upon them: but that alone will not do. Then the defendant says further, that when that took place it discharged him also as against the drawer, in consequence of what had previously occurred between the drawer and him. I am not sure that the plea discloses enough to place the plaintiffs in the situation of trustees for May-

Esch. of Pleas,
1838.

JONES
v.
SENIOR.

bury; though very little more would have made them holders for him. But I am disposed to think that if the last averment stood alone, the plea would be an answer to the action; and that clearly is not matter of excuse. The plaintiffs had better amend.

Lord ABINGER, C. B., and ALDERSON, B., concurred.

Leave to amend on payment of costs; otherwise, judgment for the defendant.

RANDALL v. RIGBY.

Lands were enfeoffed to R. H. and the defendant, to the use, intent, and purpose that the plaintiff, his heirs and assigns for ever, should receive and take out of the lands a yearly rent of 63*l.* payable half-yearly; and the defendant covenanted with the plaintiff that R. H. and the defendant, their executors, &c., or some or one of them, would pay or cause to be paid to the plaintiff, his heirs and assigns, the said yearly rent at the terms appointed for payment thereof:—*Held*, that the plaintiff could not sue the defendant in *debt* for arrears of the annuity.

THE declaration stated that heretofore, to wit, on the 17th of October, 1837, in and by a certain indenture then made between the plaintiff of the first part, William Brookes of the second part, and Richard Hollins and the defendant of the third part, the counterpart of which, &c., certain land and premises were granted, bargained, sold, aliened, enfeoffed, and confirmed unto the said Richard Hollins and the defendant, their heirs and assigns, to hold the same unto the said Richard Hollins and the defendant, and their heirs, to the use, intent, and purpose that the plaintiff, his heirs and assigns for ever, should and might, out of the said land and dwelling-houses, and other buildings erected thereupon, with the appurtenances, receive and take one clear yearly rent or sum of 63*l.* of lawful money of Great Britain, to be payable half-yearly, free from all deductions whatsoever; and to the further uses, intents, and purposes in the said indenture mentioned: and the said defendant did by the said indenture, for himself and his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the plaintiff, his heirs and assigns, that they the said Richard Hollins and the defendant, their heirs, executors, administrators, and

assigns, or some or one of them, should or would for ever thereafter well and truly pay or cause to be paid unto the plaintiff, his heirs and assigns, the said yearly rent of 63*l.* by the said indenture limited in use to him or them, on the days and times thereinbefore appointed for payment thereof, and hereinbefore mentioned, without any deduction or abatement whatsoever : and the plaintiff saith, that after the making of the said indenture, to wit, on the 25th of March, 1838, which day elapsed before the commencement of this suit, a large sum of the yearly sum or rent aforesaid, to wit, 31*l.* 10*s.* became due to the plaintiff according to the said covenant aforesaid, for one half of a year ending on the day and year last aforesaid and then last elapsed : and the plaintiff further saith, that the said Richard Hollins was then and thence to the commencement of this suit, alive. Breach, that neither Hollins nor the defendant paid, but therein made default, contrary to the said covenant of the said defendant, whereby an action hath accrued to demand the sum of 31*l.* 10*s.*

Each. of Pleas,
1838.

RANDALL
v.
RIGBY.

General demurrer, and joinder.

The cause of demurrer stated in the margin by the defendant was, that according to the authorities, debt will not lie for the arrears of a rent or annuity in fee.

Wightman, in support of the demurrer.—*Webb v. Jiggs* (a), and *Kelly v. Clubbe* (b), are authorities to shew that debt will not lie for the arrears of an annuity issuing out of land, under the circumstances stated in this declaration. There is here a covenant for the payment of the annuity, on which the action is brought. That also appears to have been the case in *Kelly v. Clubbe*, although the declaration is fully set out. But the question was much more fully considered in *Webb v. Jiggs*. There an annuity was devised to A. during the life of B., payable out

(a) 4 M. & Selw. 114.

(b) 3 Brod. & Bing. 130.

Exch. of Pleas,
1838.

RANDALL
v.
RIGBY.

of lands which were devised to B. for life, B. paying the same thereout : and it was held that debt would not lie for the arrears of such annuity. There is no doubt a distinction between that case and the present, because there the annuity was created by devise, whereas here it is by grant, with a covenant to secure its payment : but the same principle applies to both cases. Taking the whole indenture together, this is the grant of an annuity payable out of land; the covenant is a mere collateral security : and the general principle established by *Webb v. Jiggs* was, that at common law debt does not lie for the arrears of an annuity payable out of lands for life or a greater estate, while the estate of freehold continues. [Lord *Abinger*, C. B.—The annuity is charged on land in the hands of one person, and another person covenants to pay. The terre-tenant ought therefore to pay the annuity in the first instance, and the covenantor is not liable unless he refuses : that is not a debt, but only a duty on failure of payment by the terre-tenant.] Covenant might possibly lie against the defendant, but not debt ; his covenant is merely collateral.

Crompton, contra.—It may be conceded that this is a collateral covenant ; but where there is a collateral covenant in gross to pay a sum certain, or which is capable of being ascertained, the covenantee may bring debt or covenant at his election : *Ingledew v. Cripps* (a). As soon as a condition precedent in a deed has been performed, the covenantee may aver that, and debt will then lie. [*Parke*, B.—Suppose an agreement to pay a sum certain, in case A. B. does not—debt on simple contract would not lie. And I think you will find it laid down in *Viner's Abridgment* (b), that debt will not lie on a conditional covenant. The authorities are cited in *Wentworth's Office of Executors*, p. 250.] It is submitted that it is not a conditional

(a) 2 Lord Raym. 814 ; 2 Salk. 658.

(b) Vin. Abr. Debt, D.

covenant, where the party covenants to pay a sum certain, not sounding in damages; and that in such case either debt or covenant is maintainable. *Webb v. Jiggs* was a case of devise, and the Court proceeded on the ground that there was no privity between the parties. [*Parke, B.*—No; that the estate of freehold continued, and the remedy was a real remedy.] There was in that case no covenant; here there is a mere collateral covenant in gross, which would not go with the rent or with the land, but must be treated as if it were between two strangers. In *Milnes v. Branch* (a), it was held that *covenant* would not lie by the assignees of a rent charged on lands against the grantee of the lands, for that the covenant was personal to the grantor. Lord *Ellenborough* there says—"I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shewn that this is land; it might as well be applied to any covenant respecting a matter merely personal." *Cook v. Herle* (b) is to the same effect. This, therefore, is a collateral covenant in gross, on which an action may be maintained without reference to privity of estate. [*Parke, B.*—How do you distinguish this from the case of a lease, with a covenant by the lessor, his executors, administrators, and assigns, to pay the rent, and the lessee assigning, and the lessor accepting the assignee as his tenant?—the cases are clear that the lessor, or the assignee of the reversion, may bring debt against the assignee on the privity of estate, but can only bring covenant against the lessee, because the privity of estate is determined as to him, and the covenant becomes collateral: 1 Siderf. 402; *Mills v. Auriol* (c).] Those are cases where the question arose how far debt will lie when the previous privity of estate has determined; this is a mere express covenant between strangers, which in its inception was collateral, and never had any thing to do

Exch. of Pleas,
1838.

RANDALL

v.
RIGHT.

(a) 5 M. & Selw. 411. (b) 2 Mod. 138. (c) 2 H. Bl. 433.

Each. of Pleas,
1838.

RANDALL
v.
RIGHT.

with the estate. The case is distinguishable also from cases of guarantee and indemnity, because they sound in damages; but it is questionable whether a special action of debt, averring the performance of the condition precedent, would not lie in such cases.

Wightman, in reply.—No doubt this is a covenant in gross, but it is also a collateral covenant; and if it be, there is no such direct duty as will enable the plaintiff to maintain an action of debt. *Cook v. Herle* is an express authority that the covenant is collateral. The effect of it is, “I, the defendant, will take care that this annuity, which issues out of land, shall be paid.” If it had been merely a covenant by both these parties to pay a sum in gross, debt might have lain, although it was intended to secure the annuity; but it is a covenant to pay *the annuity*, which issues out of land. The primary duty is not that the defendant shall pay in the first instance; his duty is to take care that it is paid out of the land. But the first principle in an action of debt is, that there must be a direct duty to pay.

Lord ABINGER, C. B.—I think Mr. *Wightman* has drawn the true distinction. The question here is not whether the defendant is liable, but whether he is liable in this form of action. If it had appeared that this was a debt of his own, on which he was liable to the plaintiff, debt might be maintainable as well as covenant; but it is an action on a mere collateral covenant, by which the defendant, jointly with another, undertakes to secure the payment of an annuity which is issuing out of land. The case of a lessee who has assigned his lease is strictly analogous. In *Mills v. Auriol*, *Wilson, J.*, sums up the position of a lessee under such circumstances in these words: “An action of covenant remains after the estate is gone; but, generally speaking, when the land is gone, the action of debt is also gone, debt being maintainable because the

land is debtor. Covenant is founded on a privity collateral to the land." The same point had been decided in *Thursby v. Plant* (a). The defendant here stands in the same relation to the plaintiff as the original lessee after assignment of the estate, when he is only suable in covenant, not in debt.

Reck. of Plant,
1838.

RANDALL
v.
RIGBY.

PARKE, B.—I am of the same opinion. No doubt this covenant is collateral or in gross in one sense, that it does not run with the land or rent; for that *Milnes v. Branch* is an authority: but it is also collateral in the sense contended for by Mr. *Wightman*, that it is not a covenant to perform any direct duty, but only a collateral one to secure payment of the rent. Upon this undertaking an action of covenant is the proper remedy; in which the plaintiff will recover, by way of damages, the amount actually in arrear. The case falls therefore within the principle of the authority referred to in *Viner's Abridgment*, and ranges itself also with that of the lessor and lessee after assignment of the estate, as decided in *Thursby v. Plant*, and in *Mills v. Auriol*. This covenant is collateral in that sense also, and is not like a covenant to pay a sum of money, which becomes a direct duty from the defendant to the plaintiff.

BOLLAND and ALDERSON, Bs., concurred.

Judgment for the defendant.

(a) 1 Siderf. 401; S. C. 1 Saund. 230; and see p. 241, n. 5.

Edw. of Pleas,
1838.

NOEL v. DAVIS.

Declaration in indebitatus assumpsit, of four counts, the sum laid in each count being 100*l*. Plea, as to 27*l*., parcel of the monies in the declaration mentioned, a set-off to that amount on a bill of exchange:—
Held good on demurrer, though not pleaded to any particular count or sum.

ASSUMPSIT for work and labour done and materials provided by the plaintiff as an attorney and accountant for the defendant, and on his retainer, and for fees due to the plaintiff in respect thereof; with counts for money paid, and on an account stated; the sum laid in each count being 100*l*. Plea, as to the sum of 27*l*. 13*s*. 4*d*., parcel of the monies in the declaration mentioned, that the plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the defendant in a large sum of money, to wit, the sum of 27*l*. 13*s*. 4*d*., on a bill of exchange, &c., (setting it forth); which said sum of 27*l*. 13*s*. 4*d*. equals the said sum of 27*l*. 13*s*. 4*d*., parcel, &c., and out of which said sum of money so due to the defendant as aforesaid, the defendant is ready and willing and hereby offers to set off and allow to the plaintiff, the said sum of 27*l*. 13*s*. 4*d*. parcel &c., as aforesaid, according to the form of the statute &c.

Special demurrer, assigning for cause that the plea does not sufficiently state against how much of the monies in each or either of the counts of the declaration, the set-off is pleaded.

Joinder in demurrer.

Jervis, in support of the demurrer.—This demurrer is founded on that part of the judgment of the Court in *Mee v. Tomlinson* (a), with which no dissatisfaction has been expressed in subsequent cases. It was there held that a plea of set-off of 57*l*. 7*s*. 4*d*., to several sums amounting in the whole to 114*l*. 14*s*. 8*d*., with an allegation that the former sum equalled the damages sustained by the non-performance of the defendant's promises as to the latter,

(a) 4 Ad. & Ell. 262.

was bad. And *Patteson, J.*, says:—"The set-off is not pleaded by way of deduction from the larger sum; and indeed, I never saw such a thing as a set-off pleaded by way of deduction. The practice is to lay in the plea of set-off, a larger sum than that claimed in the declaration." The plaintiff is under a difficulty in knowing to what claim, or what part of the claim, the defendant applies his set-off. He ought to have averred the identity of the demands in the several counts. [*Alderson, B.*—Whatever the plaintiff proposes to prove under the whole declaration, from that the defendant proposes to take off 27*l.* 13*s.* 4*d.* What hardship is that on the plaintiff? *Parke, B.*—The same argument would apply to the plea of tender. It would be productive of very great inconvenience to lay down a general rule, that a defendant may not answer part of the claim by way of set-off. In order to make the plea good, no doubt he must answer the rest of the declaration in some way]. Suppose the plaintiff signed judgment for want of a plea to the whole declaration, is he to take nominal damages on three of the counts, and damages for the difference between the amount of his particulars and of the set-off on the fourth; or how otherwise?

R. V. Richards, contra.—The only apparent difficulty arises from the circumstance that the rest of the pleadings are not brought before the Court. This is precisely like the plea of payment or tender as to part of the claim. The defendant must exhaust all the sums in the declaration by his several pleas taken together: all he says by this plea is, that he is entitled to the amount of the set-off against whatever sum the plaintiff shall claim and prove. He could not aver the identity of the sums laid in the different counts, since they may not be in fact identical.

Jervis, in reply.—In *Mee v. Tomlinson*, *Coleridge, J.*, said that the form of the plea of tender was defensible

Reed. of Pleas,
1838.

NOEL

DAVIS.

Arch. of Pleas,
1838.

NOEL
v.
DAVIS.

only on the score of inveterate practice. There would be less difficulty imposed on the plaintiff in debt than in assumpsit, because there the difference is ascertained on the writ of inquiry.

LORD ABINGER, C. B.—If the plaintiff declares for four distinct causes of action, and the defendant pleads a set-off as to a smaller sum, generally, the plaintiff may apply it to each count, and have judgment on each; it is therefore to his advantage.

PARKE, B.—It would be extremely inconvenient to hold a defendant so tight as to say he is to plead his set-off expressly to any particular count. There will be judgment for the defendant, unless the plaintiff chooses to amend.

BOLLAND, B., and ALDERSON, B., concurred.

Judgment for the defendant accordingly.

COMPTON v. TAYLOR.

A count by the payee against the acceptor of a bill of exchange, in the form given by the rule of T. T. 1 Will. 4, may be joined with indebitatus counts in debt, the declaration concluding in the usual form in debt.

THE first two counts of the declaration were on two bills of exchange for 30*l.* and 20*l.* respectively, dated the 1st of February, 1837, drawn by the plaintiff and accepted by the defendant, payable to the plaintiff four months after date; and were in the form given by the rules of T. T. 1 Will. 4. The third, fourth, and fifth counts were in debt for goods sold, interest, and on an account stated, and the conclusion of the declaration was in the usual form in an action of debt. The defendant demurred specially, on the ground that there was a misjoinder of action, part of the declaration (the first two counts) being in an action on promises, the remainder in debt.

Thomas, in support of the demurrer.—The first two counts in the declaration are counts on promises, and cannot be joined with the counts in debt. [*Parke*, B.—It is the old form in debt against the acceptor of a bill of exchange.] In *Brill v. Neele* (a), a count stating that the defendant was indebted to the plaintiff for work and labour, and being indebted, undertook and promised to pay &c., whereby an action had accrued &c., was held not to be a good count in debt, and not properly joined with counts in debt. [Lord *Abinger*, C. B.—There no breach was alleged.] The defendant must have pleaded non-assumpsit to the first two counts, before the new rules. And they do not allege that the bills were given for value received, without which debt could not lie.

Each. of Pleas,
1833.

COMPTON
TAYLOR.

Peacock, contra, cited *Cloves v. Williams* (b); and referred to *Slade's case* (c), as an authority that every debt implies a promise.

PARKE, B.—*Cloves v. Williams* is precisely in point. I was anxious to find an authority for what seemed so consistent with good sense. There is no substantial difference between promising and agreeing.

ALDERSON, B.—I see that the forms given in the rules of T. T. 1 Will. 4, which apply to both assumpsit and debt, make no difference in the cases; and this declaration follows the form precisely. One form is given for both, and this is that form.

The other Barons concurring,

Judgment for the plaintiff.

(a) 3 B. & Ald. 208. (b) 3 Bing. N. C. 868; 5 Scott, 68.
(c) 4 Co. 92, b.; Yelv. 20.

Each. of Pleas,
1838.

ALLEN v. PINK.

The first count of the declaration was on the warranty of a horse sold by the defendant to the plaintiff for 7*l.* 2*s.* 6*d.*, and for the expense of its keep. There were also counts for money had and received, and on an account stated; and the damages were laid at 20*l.* At the trial, the plaintiff recovered the 7*l.* 2*s.* 6*d.*, the price of the horse:—*Held*, that the action was triable before the sheriff under a writ of trial.

The defendant gave a verbal warranty of the horse, which the plaintiff thereupon bought and paid for, and the defendant then gave him the following memorandum:—

“Bought of G. P. a horse for the sum of 7*l.* 2*s.* 6*d.*—G. P.”—*Held*, that parol evidence might, notwithstanding, be given of the warranty.

ASSUMPSIT.—The first count of the declaration stated, that in consideration that the plaintiff would buy of the defendant a certain horse, for a certain sum, to wit, 7*l.* 2*s.* 6*d.*, the defendant promised the plaintiff that the horse was then a quiet worker, and would go well in spare harness. It then averred the purchase of the horse, and the payment of the price by the plaintiff, and alleged as a breach that the horse was not a quiet worker, and would not go in spare harness, but on the contrary thereof, was unquiet and vicious, and became of no use or value to the plaintiff, whereby he was put to charges and expences, to wit, the sum of 5*l.*, in taking care of it. There were also counts for money had and received, and on an account stated: to the plaintiff's damage of 20*l.*

Pleas, first, non assumpsit to the whole declaration; secondly, to the first count, that the horse was a quiet worker, and would go well in spare harness; on which issue was joined.

The plaintiff's particulars of demand were as follows:—
“On the indebitatus counts the plaintiff seeks to recover 7*l.* 2*s.* 6*d.*, the price of a horse, which sum was fraudulently received by the defendant under colour of a contract of sale thereof to the plaintiff, with a warranty which the defendant knew to be false, and which horse the defendant has subsequently received back.”

The cause was tried in this term before *Arabin*, Serjt., at the Sheriff's Court in London, under a writ of trial which had been obtained by consent of both parties. It appeared that in the month of April last, the plaintiff treated for the purchase of the horse in question, at Aldridge's repository, when the defendant said that if he did not work well, and go quietly in spare harness, the plaintiff was to send him back, and he should have his money

returned. The plaintiff, after some further conversation, bought him for 7*l.* 2*s.* 6*d.*, which sum he paid the defendant shortly afterwards at a public house, and then received from him the following memorandum:—

Exch. of Pleas,
1838.

ALLEN
v.
PINK.

“ Bought of G. Pink, a horse for the sum of 7*l.* 2*s.* 6*d.*
“ G. PINK.”

On putting him into harness, the plaintiff found that the horse was vicious and unruly, and accordingly sent him back to the defendant; and having demanded his money again, which was refused, he brought this action to recover it. A verdict having been found for the plaintiff, under the direction of the learned Serjeant, for 7*l.* 2*s.* 6*d.*,

Byles obtained a rule nisi for a new trial, on several grounds of objection taken at the trial:—First, that this being an action for unliquidated damages, was a cause which the sheriff was not empowered, under the 3 & 4 Will. 4, c. 47, s. 17, to try; *Smith v. Brown* (a): secondly, that the terms of the contract being ascertained by the bought note delivered to the plaintiff, which contained no warranty, the parol evidence of a warranty was not receivable; *Gardiner v. Gray* (b), *Powell v. Edmunds* (c): and thirdly, that the evidence did not prove the warranty alleged in the declaration, but a conditional contract to take the horse back in the event of his not working well, &c.

Gurney shewed cause.—It may perhaps be admitted, that if this was a case in which the judge had no power under the statute to make the order for trial before the sheriff, the sheriff had no jurisdiction to try it. But there is nothing to shew that this is “a debt or de-

(a) 2 M. & W. 851.

(b) 4 Campb. 444.

(c) 12 East, 6.

Exch. of Pleas,
1838.

ALLEN
v.
PINK.

mand on which the sum sought to be recovered, and indorsed on the writ, exceeds 20%. As the order was obtained by consent of both parties, the plaintiff has a right to assume, until the contrary is shewn, that the sum indorsed, and sought to be recovered, was within the amount limited by the statute. Then, as to the nature of the action. Actions of *tort* have no doubt been decided not to be within the act; *Watson v. Abbot* (a), *Smith v. Brown* (b). But this is in *assumpsit*, and is in substance an action for the price of the horse. *Price v. Morgan* (c) is directly in point. There the declaration was on an *assumpsit* by the defendant that he was authorized by a third party to purchase on his behalf a pony from the plaintiff, which the plaintiff therefore sent to the defendant; containing also counts for a pony sold and delivered, and on an account stated: and it was held that the case was within the act. *Parke, B.*, says—"This was an action in substance for the price of the pony, and therefore within the act." Here the verdict was in fact for the actual price of the horse. [He was then stopped by the Court.]

Byles, contra.—The 16th and 17th sections of the statute do not enable a Judge to make an order, even with the consent of the parties, in a case like this, where the damages are of an unliquidated nature. The "debt or demand" must be such as might be indorsed on a writ. What that is, is shewn by the rule of H. T. 2, Will. 4:—"It is ordered that upon everyailable writ or warrant, and upon the process or copy served for the payment of any debt, *the amount of the debt* shall be stated, and the amount of what the attorney claims for the costs, &c." The rule explains what the statute intends, viz. a debt of such a nature as that the party might be arrested for it, if sufficient in amount. Then the 17th section also says,

(a) 2 C. & M. 150.

(b) 2 M. & W. 851.

(c) *Id.* 53.

that the issues shall be tried before the sheriff, or any "judge of any Court of record *for the recovery of debts.*" [Lord Abinger, C. B.—What meaning do you give to the word *demand*?] A claim for which an indebitatus assumpsit will lie may properly be called so, especially when it is on a quantum meruit. The same words "debt or demand" occur in the Bankrupt Act, under which a creditor cannot prove for unliquidated damages: so also in many acts establishing Courts of Requests, in which the extended meaning now contended for has never been put upon them. It is not only necessary that there shall be an indorsement of a definite sum under 20*l.*, but it must be an action of a nature in which there *can* be such an indorsement. This Court cannot give judgment, the verdict being general, if the case was not within the statute: *Smith v. Brown.*

Each. of Pleas,
1888.

ALLEN
v.
PINE.

Secondly, the contract having been reduced to writing, no evidence was admissible of any parol warranty to add to it: *Greaves v. Ashlin (a).* [Alderson, B.—What you call a *bought note* was nothing more than an informal receipt.] It contains all the terms of the contract, as far as they relate to the party signing it: it ascertains the seller's name, the chattel to be sold, and the price.

Lastly, the warranty was not proved as laid: the evidence is of a mere conditional contract, that if the horse is not a good worker, &c., the plaintiff may send him back, and the bargain shall be rescinded; which, on a contract of warranty of a specific chattel, the purchaser would have had no right of doing: *Street v. Blay (b).* On this declaration, the plaintiff seeks to recover unliquidated damages; but, in the contract proved, his course would be to return the horse, and sue the seller for money had and received, the contract being rescinded by the previous agreement of the parties.

(a) 3 Campb. 426.

(b) 2 B. & Ad. 456.

Each. of Pleas,
1838.

ALLEN
v.
PINK.

LORD ABINGER, C. B.—The first point in this case is not altogether free from doubt; but the case of *Price v. Morgan* is very analogous to the present. That was an action of assumpsit, and the Court thought that in substance the action was brought for the price of the pony. The word “demand” must be construed to mean a claim ejusdem generis with debt; and when the claim is under 20*l.*, and is in the nature of a demand for which assumpsit will lie, it may be reasonably considered as falling within the terms of the statute. I am disposed, therefore, to adhere to the authority of *Price v. Morgan*, which was not a stronger case than this. This is an action for the breach of a warranty to go quiet in harness, which would be limited by the price of the horse and the price of his keep, if any; and the whole demand is under 20*l.* I am rather disposed to extend than to limit the operation of the statute. As to the other points, the general principle stated by Mr. *Byles* is quite true, that if there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked to to ascertain the terms of the contract; but the principle does not apply here; there was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant; the contract is first concluded by parol, and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not as containing the terms of the contract itself. With regard to the last point, it was a question for the jury whether it was intended to be a conditional sale, or whether what the defendant said was not rather an emphatic mode of giving a warranty: and I think the jury have very probably drawn the right conclusion.

BOLLAND, B.—But for the case of *Price v. Morgan*, I should certainly have doubted whether this was a case

within the act; and if the application have been made to me, it is not a case which I should have sent before the sheriff. The object being to lessen expense, and facilitate the trial of simple cases, I have looked upon the statute as being confined to cases of money demands; here the damages are unliquidated, and depend on the view that may be taken of the warranty. However, I do not mean to express any dissent from the case of *Price v. Morgan*; and more especially as Mr. *Byles* alleges that in this case there was no warranty.

Exch. of Pleas,
1838.

ALLEN
v.
PINK.

ALDERSON, B.—I consider the first point as determined by *Price v. Morgan*, and that the present case does not fall within the authority of *Smith v. Brown*, which was for unliquidated damages altogether. This is in substance an action for the price of the horse, to be recovered by proof of the breach of warranty; the plaintiff cannot recover more than that amount, which is clearly within the limit of the statute. On the other points I concur, and think the verdict was right.

Rule discharged.

WILLIAMS v. MOSTYN, Bart.

CASE against the sheriff of Flintshire for a voluntary escape.—Plea, not guilty. At the trial before *Alderson*, B., at the Middlesex Sittings in last Hilary Term, it appeared that one Langford was arrested on a *capias ad respondendum* at the suit of the plaintiff, on the 5th of September, for a debt of 47*l.*, and lodged in Flint gaol. Bail above was not put in in due time. Langford was brought from the gaol, in custody of the gaoler, on the

A debtor in custody of the sheriff on mesne process was taken, after the writ was returnable, from the county gaol, in the gaoler's custody, to a place in the same county several miles distant, in order to give evidence

before a revising barrister, and was returned into the gaol the same day:—*Held*, that this was an escape.

No action can be maintained against the sheriff for the escape of a prisoner in custody on mesne process, unless the plaintiff have sustained actual damage or delay of his suit thereby.

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

3rd of October, to Mold, in the same county, a distance of six miles from Flint, in order to prove the service of certain notices of objection before the Revising Barrister; and on the same evening he was returned to the gaol, in the same custody. It was admitted that the plaintiff had sustained no actual damage or delay in his suit. For the defendant it was contended, first, that this was no escape; and secondly, that the plaintiff could not recover without proof of actual damage, for which *Planck v. Anderson* (a) was referred to. For the plaintiff, *Balden v. Temple* (b) was cited, and it was insisted that damage flowed in law from the breach of duty: and, under the direction of the learned Judge, a verdict was found for the plaintiff with nominal damages, leave being reserved to the defendant to move to enter a nonsuit.

Jervis having obtained a rule nisi accordingly,

Wightman shewed cause in Easter Term.—First, the defendant was guilty of an escape. There are few cases on the precise point now before the Court, but the authorities relating to what shall be deemed an escape, whether on mesne process or in execution, are collected in *Bac. Abr.*, *Escape in Civil Cases*, B. & D; and the result of them is, that if the sheriff has a defendant in custody on *final* process, he is bound to keep him “in arctâ et salvâ custodiâ,” and the letting him go abroad at all, at any time, though with a keeper, and for ever so short a time, amounts to an escape: *Plowd.* 36; *3 Co.* 44; *2 Inst.* 381; *Cro. Car.* 466; *Roll. Abr.* 806: but that after an arrest on *mesne* process, the sheriff or gaoler may suffer the prisoner to go at large, provided he has him *at the return of the writ*: *Atkinson v. Matteson* (c), *Hawkins v. Plomers* (d), *Fuller v. Prest* (e), *Lewis v. Morland* (f). And therefore it was,

(a) 5 T. R. 37.

(b) Hobart, 202.

(c) 2 T. R. 72.

(d) 2 W. Bla. 1048.

(e) 7 T. R. 109.

(f) 2 B. & Ald. 56.

that in actions for escape on mesne process, it was necessary to aver that the sheriff "ad largum ire permisit et non comperuit ad diem," whereas on process of execution, "ad largum ire permisit" was sufficient: *Sheriff of Nottingham's case* (a). But this doctrine applies in its very terms to escape on mesne process *before the return of the writ*, whereas here it was afterwards, the writ being returnable immediately. The distinction is obvious; the writ of mesne process is only for the purpose of compelling appearance; if, therefore, the defendant appear at the day specified in the writ, the plaintiff is not damnified by his having been at large in the interval, inasmuch as until appearance he could take no further step in the suit; but if that day be allowed to pass, and the writ has not been obeyed by the defendant's appearance, it then becomes the sheriff's duty to keep him in the same strict custody as on final process, in order that the plaintiff may at any moment commence further proceedings against him. And the sheriff cannot, under the general plea of not guilty, set up as a defence the return of the defendant to and his continuance in custody; that ought, if it amount to an excuse, to have been pleaded specially.

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

Secondly, the plaintiff is entitled to recover without proof of actual damage, for damage results in law from the wrongful act, which was complete by the sheriff's having voluntarily permitted the party to go abroad beyond the limits of the gaol. It is immaterial whether the time for which he was out of the proper custody was long or short, or whether he returned into it or not; the breach of duty is complete by the voluntary act of the sheriff in permitting him to go out, and so disabling himself from having him ready *at every moment* when the plaintiff may desire to commence further proceedings against him. The plaintiff may desire to deliver a declaration to him, or to the

(a) Noy, 72.

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

gaoler in whose custody he is, under the 4 & 5 Will. & M., c. 21 ; or the plaintiff, or the Court itself, may at any moment require him to be brought up by habeas corpus ; which must necessarily be delayed by his being permitted to go about the county, although in the gaoler's custody. And it is a general proposition of law, that whenever a party has been guilty of a breach of duty, whether arising out of contract or not, the party in infraction of whose rights that breach of duty has been committed, is entitled to damages, actual or nominal, as the case may be, for such infraction. In *Barker v. Green* (a) the Court said expressly, that "if there was a breach of duty, the law would presume some damage." So, in *Blofeld v. Payne* (b), it was held that the plaintiff was entitled to nominal damages for the invasion by the defendant's fraud of his right to the use of certain envelopes for metallic hones, of which he was the inventor, although he did not prove that he had sustained any specific damage. *Planck v. Anderson* (c), which will be relied upon by the other side, if it can be considered as law at all, is nevertheless distinguishable from the present case. There, a party having been arrested on a writ of mesne process, was kept by the sheriff in a lock-up house until after the return of the writ, and then was taken to prison ; and the jury having found that the plaintiff was not delayed or prejudiced in his suit, the Court held that it was not an escape. That case only shews that the taking the defendant from the lock-up house to prison, after the return of the writ, is not in itself an escape ; and rightly so : because, supposing the party were arrested just before the return of the writ, by the statute 28 Geo. 2, c. 32, he could not be taken to prison for twenty-four hours, within which period the time for the return would expire ; yet he ought at the expiration of that period to be taken to prison. Besides, the de-

(a) 2 Bing. 317.

(b) 4 B. & Ald. 410.

(c) 5 T. R. 37.

fendant there was all along in the same custody, for the lock-up house might fairly be considered as part of the sheriff's prison. Here the custody is changed altogether: the party is sent out of the sheriff's gaol to a distant place, and for an entirely different purpose.

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

Jervis and *Whateley*, contra.—If the old authorities on the subject of escapes be carefully examined, it will appear questionable whether this is an escape, being on mesne process, even supposing the return of the writ to have been past. The old text books, in treating of this subject, almost always apply to escapes on final process. This appears from the definition of an escape in the *Termes de la Ley*, and the several instances given in *Roll. Abr.* 806. All the cases referred to on the other side have been cases of escapes of persons in custody on writs of execution. [*Parke*, B.—The resolution in *Cro. Car.* 446, appears to apply generally to all persons in the custody of the Marshal.] There is moreover a further distinction, which prevents their strict application to the present case: here, the party, although he was out of the prison itself, was never out of the county, and therefore never out of the jurisdiction of the sheriff; in most of those cases it was otherwise. The authority most adverse to the defendant is the observations in 3 Co. 44, and they have been considerably qualified by subsequent decisions: see *Hawkins v. Plomers* (a). What is said in the 2 Inst. 381, applies only to imprisonment under the statute of Westminster 2, and would not be considered law at the present day. It is a long-established principle of law, that the court shall make “as favourable a construction in favour of sheriffs, &c., as the law will suffer, and never to adjudge one to make an escape by any strict construction (b).” But further, although since the Uni-

(a) 2 W. Bla. 1048.

(b) 3 Co. 44, b. See *Gawdy's case*, Dyer, 378, b.

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

formity of Process Act, 2 Will. 4, c. 39, the *capias ad respondendum* is returnable forthwith, it has been decided that the old practice, as to the liability of the sheriff, is not changed thereby; and it is reasonable that the plaintiff ought first to have given the sheriff notice, by ruling him to return the writ, before he could be entitled to sue him for an escape.

But, secondly, it is a clear principle of law, that in all actions of tort, and particularly actions on the case, damages are the essence of the action, and cannot be recovered unless they have actually accrued and been sustained. To this rule there is one exception only, namely, where the action is brought for an infringement of some *reputed right*; since if in such case the wrongful act were permitted to be done without entitling the party claiming the right to a verdict at law, the wrong doer might in time make the repetition of it evidence of a right in himself. Thus, a commoner may recover against a stranger for unlawfully turning cattle on the common, although he have at the time no cattle of his own on it; because that it is such an act as, being repeated, might in time be used as evidence of a right in the intruder. So, trespass to land will lie without proof of actual damage; because the mere coming on the land would in time enable the wrong doer to set up a right of way. The decision in *Blofeld v. Payne* was founded on the same principle. But this reason does not apply to other actions of tort. In this case, no repetition of the act complained of would ever become evidence of any thing. *Planck v. Anderson* is expressly in the defendant's favour, and although *Barker v. Green* is undoubtedly in conflict with it, the report of the latter case is very loose and unsatisfactory, and *Planck v. Anderson* does not appear to have been referred to. So, in *Scott v. Henley* (a), *Littledale, J.*, ruled that the sheriff was only liable, upon an escape on mesne process, for

(a) 1 M. & Rob. 227.

such damages as the plaintiff could shew he had actually sustained. In *Brown v. Jarvis* (a), Lord Abinger, C. B. strongly intimated an opinion that the same principle applied to an action against the sheriff for negligence in not arresting a defendant. And in *Lewis v. Morland* (b), Lord Tenterden says expressly—"Supposing the sheriff to be guilty of a breach of duty in letting the party out of custody, it does not thence follow that any action may be maintained against him for such breach of duty."

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

Cur. adv. vult.

The judgment of the Court was delivered in this term by

PARKE, B.—In this case an action was brought against the sheriff for an escape, to which there was a plea of not guilty. It was tried before my Brother Alderson. The facts appeared to be, that the plaintiff issued a writ of *capias* against Langford, returnable on the execution thereof. On the 5th September, Langford was arrested, and bail above was not put in in due time. Langford continued in the custody of the sheriff, but, on the 3rd of October, was out of the county gaol attending the Court of a Revising Barrister, in the charge of a sheriff's officer. This was the escape relied upon. It did not appear that the plaintiff had issued an *habeas corpus* to bring up the body of the defendant, in order to charge him with a declaration, nor that he had been prevented from declaring against him in the custody of the sheriff; and the jury negatived all actual damage. The learned Judge directed a verdict for the plaintiff with nominal damages, and certified to deprive the plaintiff of costs, but reserved liberty to move to enter a nonsuit. A rule to shew cause was granted, and two questions were very fully discussed on the argument. The first was, whether the sheriff was bound to keep prisoners in his custody after the return of

(a) 1 M. & W. 709.

(b) 2 B. & Ald. 64.

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

mesne process, and before they are charged in execution, in *arctâ custodiâ* in his gaol. The second question was, whether the plaintiff could maintain this action unless he had sustained actual damage.

That a debtor in execution must be kept in prison and not allowed to go out, though with a keeper, is a matter beyond doubt, although it was slightly questioned at the bar; and the authorities in *Plowd. 36, Balden v. Temple (a), Small's case (b), Dalton, 561, Boyton's case (c), Roll Abr. 806*, are distinct upon this point. And we think that the law is the same in the case of defendants in custody of the sheriff after the return of the writ of *capias ad respondendum*, and before they are charged in execution. It is clear it is so with respect to those in the custody of the Marshal or Warden of the Fleet, by the resolution of the Judges in *Cro. Car. 466*, and by the express provisions of the statute 8 & 9 Will. 3, c. 27. With respect to sheriffs, it is laid down to be the duty of the sheriff to carry his prisoner to the county gaol, by *Buller, J.*, in the case of *Planck v Anderson (d)*, and that he ought to do it at the return of the writ; but that is subject, of course, to the qualification introduced by the Lords' Act, 32 Geo. 2, c. 28, that a prisoner is not to be carried there until after twenty-four hours from his arrest. The statute 4 & 5 Will. & M. c. 21, by its recital, shews that it was the practice, before the passing of the act, that prisoners, after the return of the writ, should be in gaol; and its enactments provide for the delivery of a declaration to the *gaoler* or *keeper* of the prison, and not to any one else; thereby proving that the prisoner ought to be kept in prison after the return of the writ. We think, therefore, that the sheriff was wrong in permitting the prisoner to be out of the limits of the gaol.

The second question then arises, whether the fact of

(a) Hob. 202.

(b) 2 Bul. 148.

(c) 3 Coke, 44, a.

(d) 5 T. R. 37.

the prisoner being out of gaol, though with a sheriff's officer, be actionable, without proof of some damage. If the prisoner is in execution, there is no question about it, for it is clear that the creditor, "when he is ascertained to be such by a judgment, and he has charged the debtor in execution, has a right to the body of his debtor every hour till the debt is paid (a)." He has a right to have the body *in gaol*, and the escape of a debtor, for ever so short a time, is necessarily a damage to him, and the action for an escape lies. Lord *Holt* says, in *Ashby v. White* (b), "every injury to a right imports a damage in the nature of it, though there be no pecuniary loss." But the question upon which we have entertained some doubt is, whether the plaintiff, before judgment, can maintain such an action upon proof of the escape alone: and upon this point the authorities are apparently conflicting.

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

We think that the action is not maintainable. The nature of the sheriff's duty, before the statute 4 & 5 Will. & M. c. 21, was to keep the prisoner in gaol, after the return of the writ, ready to be removed at any time that the plaintiff chose, by habeas corpus, into the superior court, there to be charged with a declaration. Since that statute, the nature of his duty is, to have him ready either to be so removed, or to be declared against as in custody of the sheriff; and the right of the plaintiff is correlative to the duty of the sheriff: it is a right to have the defendant in custody, *whenever he chooses to remove or declare against him*, in order that his suit may be conducted with due expedition: and Mr. Justice *Buller* states the nature of the sheriff's duty to be, that after the return of the writ he must keep the defendant at his peril, in case the suit be delayed. There would, we think, be no doubt that if the plaintiff had sued out his writ of habeas corpus during the defendant's absence from prison, and

(a) *Per Buller, J.*, 5 T. R. 40.

(b) P. 14, new edit.

Exch. of Pleas,
1838.

WILLIAMS
v.
MOSTYN.

been prevented from executing it, or had offered to deliver a copy of the declaration during such absence, and had been prevented by the absence from doing so, he would have had a right of action, for then his suit would have been delayed, and delay of suit, however short, is necessarily a damage. The case of *Planck v. Anderson* is not to be understood as laying down a rule that any other damage is necessary, but only that damage to this extent is; for the judgment proceeds upon the assumption that the verdict of the jury was right, that there had been no delay, though Mr. Justice Buller intimates it ought to have been to the contrary. But if the plaintiff neither sues out a writ, nor declares, his suit is not delayed, and there has been no impediment to the exercise of his right, for he has not chosen to exercise it. We think, therefore, that this is a case in which there has been no damage in fact or in law; and we adhere to the authority of *Planck v. Anderson* rather than that of the more recent case of *Barker v. Green* (a), which is very shortly and certainly inaccurately reported. It appeared that the sheriff had not the defendant in custody *at the return of the writ*, but had the day after; the Judge left it to the jury to say what damage the plaintiff had sustained, observing that he did not see what possible damage there could be. The jury found damage to the amount of one farthing, and the Court are said to have held, that if there was a breach of duty, the law would presume damage, and yet to have also held that the direction to the jury was correct, which on that assumption it could not have been. This must be an inaccuracy in the report. The case of *Planck v. Anderson* was not cited, nor the question as to the sheriff's duty discussed; and we think we ought not to give the same weight to this authority, as to the more fully reported case of *Planck v. Anderson*.

Rule absolute.

(a) 2 Bing. 317.

Exch. of Pleas,
1838.

JORDAN v. NORTON.

ASSUMPSIT for the price of a mare sold and delivered, and on an account stated. Plea, non assumpsit. At the trial before *Gurney, B.*, at the last Oxford Assizes, it appeared that, after some negotiation between the plaintiff and defendant (who lived at a distance of about thirty miles from each other) for the purchase by the defendant of the plaintiff's mare, she was sent on the 16th of October, 1837, at the defendant's request, to a public-house called the *World's End*, nearly half-way between their houses, for trial by the defendant. The defendant's son, in his presence, rode the mare, and the defendant then offered twenty guineas for her, which was refused by the plaintiff's servant who had her in charge, he having directions from the plaintiff not to take less than 22*l.*, and he took her back. The plaintiff, however, was afterwards willing to let the defendant have her for twenty guineas, and wrote to him to that effect. The defendant wrote in answer as follows :

“ Uxbridge, October 17, 1837.

“ Sir,—I will take the mare at twenty guineas, *of course warranted* ; but as you say you have another horse that I shall buy, the same expense will bring the two up ; therefore, as the mare lays out, turn her out my mare ; and I will meet you at West Wycombe, Saturday or Monday, which day you like, and pay you at once.—W. NORTON.”

In assumpsit for a mare sold and delivered, to which the defendant pleaded non assumpsit, it appeared that the defendant, having seen and ridden the mare, wrote to the plaintiff: “ I will take the mare at 20 guineas, *of course warranted*; and as she lays out, turn her out my mare.” The plaintiff agreed to sell her for the 20 guineas. The defendant subsequently wrote again to him:—“ My son will be at the *World's End* (a public house) on Monday, when he will take the mare and pay you: send any body with a receipt, and the money shall be paid; only say in the receipt,

sound, and quiet in harness.” The plaintiff wrote in reply, “ She is warranted sound, and quiet in double harness ; I never put her in single harness.” The mare was brought to the *World's End* on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days, and then returned her as being unsound. The learned Judge stated to the jury that the question was whether the defendant had accepted the mare, and directed them to find for the defendant if they thought he had returned her within a reasonable time; and desired them also to say whether the son had authority to take her without the warranty. The jury found that the defendant did not accept the mare, and that the son had not authority to take her away:—*Held*, on motion to enter a verdict for the plaintiff, that there was no complete contract in writing between the parties; that, therefore, the direction of the learned Judge was right; that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent; and consequently that the plaintiff was not entitled to recover.

Exch. of Pleas,
1838.

JORDAN
v.
NORTON.

The mare was sent to Wycombe accordingly, but the defendant was not there; two appointments also which were subsequently made, one at the World's End, and the other at Wycombe, not having been kept by him, the plaintiff wrote to him on the subject, and received the following answer:—

“ Uxbridge, October 26th, 1837.

“ Sir,—Of course I mean to have the mare, and if you had read my note properly it would have saved you a great deal of trouble. I now say, my son will be at the World's End on Monday, the 30th instant, when he will take the mare and pay you. If you want to go elsewhere, send any body with a receipt, and the money shall be paid; only say in the receipt *sound, and quiet in harness.*”

On the 27th of October, the plaintiff wrote in answer:—
“ I will send the mare as desired; *she is warranted sound, and quiet in double harness*; I never put her in single harness, as I never wanted it.” On the 30th, the mare was sent to the World's End, according to the appointment; but the defendant's son not being there, the plaintiff's servant left her in the care of the landlord, with directions not to give her up to the defendant without payment of the price. After he had gone, the defendant's son came, took away the mare without paying for her, rode her home (a distance of eighteen miles) to the defendant's stable, where she was kept two days, and then sent back as being unsound, her legs being at that time swelled; but the plaintiff refusing to receive her, she was turned out of his yard, and it did not appear what had become of her. The son, who was called as a witness for the defendant, said that his father had given him directions not to bring the mare away from the World's End without the warranty, and was angry with him for having done so. He also, as well as the person who took her back to the plaintiff's, spoke to her unsoundness at that time. This evidence was objected to by the plaintiff's counsel, but the learned Judge held that it was receivable

in mitigation of damages. In summing up, his Lordship told the jury that the plaintiff was bound, in order to recover, to prove a delivery of the mare; but there could not, under the circumstances of the case, be a complete delivery unless there had been an acceptance on the part of the defendant, whereby he had waived the conditions he had previously required, and which the plaintiff had not complied with, namely, the giving of a receipt, and of a warranty inserted in it: that the question whether there had been such acceptance would depend on whether the defendant had returned the mare within a reasonable time or not; and if they thought he had returned her within a reasonable time, that they should find for the defendant; if not, for the plaintiff. He also desired them to state their opinion whether the defendant's son had authority to take away the mare without a warranty. The jury found that the defendant had not accepted the mare, and that the son had no authority to take her away. The learned judge thereupon directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for the sum of 21*l.* in case the Court should think the direction to the jury, and the admission of evidence of unsoundness, to have been wrong.

Exch. of Pleas,
1838.

JORDAN
v.
NORTON.

Talfourd, Serjt., having obtained a rule to enter a verdict, or to enter a verdict for nominal damages, on the latter ground of objection, or for a new trial,

Ludlow, Serjt., now shewed cause.—The defendant's son having, as the jury have found, acted without his authority in taking home the mare, the defendant was not bound by his act; and having returned her within a reasonable time, he has done nothing whereby to waive his previous demand of a warranty and of a receipt. Neither of these having been given, and there having been no acceptance by the defendant, the contract was never com-

Exch. of Pleas,
1838.

JORDAN
v.
NORTON.

plete so as to bind the defendant. It is true, the plaintiff offered to give a limited warranty, that the mare was quiet in *double* harness; but that not being co-extensive with the warranty required by the defendant, left the contract still open, and nothing but an actual acceptance of the mare, and a waiver of the warranty, could render the defendant liable for the price. Whatever the contract was, the vendor had a right to insist on the payment of the price before delivery; so, on the other hand, the vendee had a right to insist on the terms interposed by him, viz. that he should have a receipt for the money, in which should be embodied an acknowledgment of the warranty required by him. If the plaintiff insists that he has delivered the mare, he must be taken to have adopted the condition of the defendant, that a warranty should be given of her being quiet in harness generally, without any limitation. In effect, the son goes home to ascertain whether the father will adopt the delivery. There was no contract which the plaintiff could enforce, except that, the terms of which were stated by the defendant, and from which he has never receded. He was therefore clearly entitled to a verdict.

Talfourd, Serjt., and *Keating*, contra.—There was a complete delivery to the son, who was the agent pointed out by the father himself to receive the mare, and the party with whom the plaintiff was to deal. The defendant was not entitled afterwards to object that the son had but a limited authority, and that he was his agent for some purposes, and not for others. He might as well have said the son was his agent to receive the mare, but not to pay the price. He authorized him to do all that related to the delivery; and it must be taken as if the defendant had been there himself, without having written the letter of the 27th, and had taken her away without insisting on the previous conditions.

But the learned Judge misdirected the jury, in leaving to them the question whether the defendant had *accepted* the mare. In the first place, there was a complete binding contract, and therefore no acceptance was necessary in order to make a complete delivery: and further—even if the express contract was open, and the plaintiff was bound to resort to an *implied* contract, there is sufficient on the face of the evidence to bind the defendant.—The letter of the 17th of October must be looked to. Now, before that letter was written, there had been a trial of the mare by the son *riding* her;—there had been no trial *in harness*: then the defendant writes to offer twenty guineas, subject only to a warranty, which terms the plaintiff accepts. There was then, therefore, a complete executory contract between them, on the plaintiff's warranting her sound; for the warranty then imported soundness only. [*Alderson, B.*—It is shewn by the subsequent correspondence, that it meant sound and quiet in harness.] The defendant certainly introduced that term, but it does not appear that the plaintiff assented to it. The opinion of the jury ought to have been taken whether the trial, without harness, did not import that the warranty agreed for applied to soundness only. If any new term was to be introduced, the assent of the plaintiff was necessary to give it effect; and even if there was such assent, it did not become a *condition precedent* to the payment of the price, without consideration. [*Parke, B.*—True, if there was a binding contract before; but that is the difficulty. *Alderson, B.*—I think it is clear that at that time the contract was not only for the defendant to give a warranty, but such a warranty as the parties should afterwards agree upon.] It is submitted that the contract was substantially completed between the parties: if so, no *acceptance* was necessary, and the learned Judge was wrong in resting the case upon the defendant's intention to accept, as constituting a delivery. Delivery may be complete, for the purpose of

Exch. of Pleas,
1833.

JORDAN
v.
NORTON.

Exch. of Pleas,
1838.

JORDAN
v.
NORTON.

this action, without acceptance. It has been universally held, in special declarations on a contract, that a substantial performance of conditions precedent is sufficient.

But further, even if the express contract remained open, the acts of the defendant were sufficient to fix him with an implied promise to pay the price, and it was misdirection, under the circumstances, to ask the jury whether the mare had been kept beyond a reasonable time. The son rode her eighteen miles; the defendant kept her two days, and then returned her with her legs swollen. These acts of the defendant (looking also to his previous conduct as to the trials of the mare, &c.) were sufficient to conclude him as the purchaser: *Street v. Blay* (a). [*Parke, B.*—The question, whether the defendant has so dealt with her as to raise an implied promise to pay, has been left to the jury, and they have found he did not accept her.] Lastly, with respect to the evidence offered as to the unsoundness of the mare, it was never put to the jury what would be the value of her if unsound: and the jury, when the question was put to them as to the return within a reasonable time, would assume that he had a right to return her, being unsound. But the case of *Street v. Blay* shews, that having had an opportunity of exercising his judgment on the mare before the purchase, he might have accepted and received her so as to preclude himself from returning her on discovering a non-compliance with the warranty, and yet the return might have been within a reasonable time, assuming him not to have so precluded himself from it. [*Parke, B.*—That would be so, had there been a complete contract of purchase; here the question is, whether there ever was a purchase.]

PARKE, B.—I am of opinion that this rule should be discharged. The first question to be disposed of is, whether there is any evidence of a complete contract in writ-

(a) 2 B. & Ad. 460.

ing between the parties. If there was, then the only step necessary to be proved in order to entitle the plaintiff to recover in this action, was to prove the delivery of the mare, and it was not competent to the defendant to annex to it any conditions. It certainly appears that the mare was seen by the defendant, and ridden in his presence, and twenty guineas offered by him for her, prior to the first material letter to which I am about to advert; that is, on the 16th of October. Then, on the 17th, the defendant writes a letter to the plaintiff, which amounts to a proposal to take the mare on new terms, one of which was not yet arranged between the parties. [His Lordship read the letter.] This letter amounts only to a proposal to give twenty guineas for the mare, provided she were warranted; but the terms of the warranty still remained to be agreed upon. If the parties do not agree upon a warranty which shall be satisfactory to both, there is no complete contract. We are to see, then, whether there was a warranty subsequently agreed on. Next comes the letter of the 26th of October. [His Lordship read it.] By that letter the defendant agrees to be bound by the contract, if the plaintiff will give a warranty of a particular description—viz. that the mare is quiet in harness; that is, *primâ facie*, in all descriptions of harness. The plaintiff replies, that he will agree, not to the precise terms of the warranty asked for, but only that she is quiet in double harness. The correspondence, therefore, amounts altogether merely to this:—that the defendant agrees to give twenty guineas for the mare, if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties never have contracted in writing *ad idem*.

We are then to ascertain, in the next place, whether this is supplied by the parol evidence, or by the acts or conduct of the parties. There is nothing in the parol evidence to supply it: the question therefore is, first,

Exch. of Pleas,
1838.

JORDAN
v.
NORTON.

Exch. of Pleas,
1838.

JORDAN
v.
NORTON.

whether the conduct of the defendant's son at the World's End amounts to an acceptance. It is contended that the defendant is bound by the son's acts on that occasion; but I think he is not, because the son had only a limited authority; and if a party contracts with another through his agent, he can take only such rights as the agent can give: and this is no hardship on the plaintiff, because he was distinctly informed that the son was authorized to receive the mare *if* a warranty were given that she was quiet in harness. Then the only remaining question is, whether she was in fact accepted by the defendant on the terms of the limited warranty proposed by the plaintiff. That question was left to the jury, and they found it in favour of the defendant. I agree, that if there was a complete contract in writing before, the direction of the learned judge would not have been quite correct: but the question being whether there was an acceptance in fact, the contract not being complete before, the direction was perfectly unexceptionable. The case comes therefore to this:—there was no complete contract in writing by which both parties were bound, there was no sufficient delivery to the defendant, and there was no acceptance. The defendant is therefore entitled to the verdict.

BOLLAND, B.—I am of the same opinion. There is one point only which I will observe upon. It is said, that after the mare was taken home, she was kept for such a time as shewed that the defendant intended to adopt the act of his son, and amounted to an acceptance on the new terms. That reasoning may apply to the case of a specific chattel, where the party has had an opportunity of exercising his judgment upon it: but here the defendant had had no previous opportunity of ascertaining whether the mare was quiet in all harness, which was what he required: the plaintiff had only warranted her quiet in double harness.

ALDERSON, B.—If the contract was complete—if the one had agreed to sell and the other to buy completely, there was a sufficient delivery. Again, if the son was authorized to receive the mare on the limited terms agreed to by the plaintiff, the delivery to him was sufficient: or if, not being so authorized, the defendant had nevertheless agreed to receive her on the delivery to him, that would have been sufficient to bind him. But the son had no such authority, and the father, immediately on the mare coming home, repudiates his act, and within a reasonable time returns her. I think there was no case for the plaintiff.

Exch. of Pleas,
1839.

JORDAN
v.
NORTON.

GURNEY, B., concurred.

Rule discharged.

CORNER v. SHEW, Executor of LEWIS, Deceased.

THE rule having been made absolute, in Hilary Term last, to arrest the judgment in this case, on the ground that there was a misjoinder of counts in the declaration (*a*), *Platt*, in the same term, obtained a rule to shew cause why that rule should not be varied, and instead of the judgment being arrested, a venire de novo should not issue, on the authority of *Leach v. Thomas* (*b*).

Where there is a misjoinder of counts, and the jury find general damages, a venire de novo cannot be awarded, but the judgment must be arrested.

Channell shewed cause in this term.—There are two answers to this application. First, it is too late, after the rule for arresting the judgment has been argued and made absolute; the plaintiff ought to have then applied that the rule should go in a modified form. But secondly, the authority of *Leach v. Thomas* does not apply to this case. There the objection was that general damages were given on a declaration in which several breaches

An application for a venire de novo, made by the plaintiff on a subsequent day in the same term after a rule for arresting the judgment had been made absolute, was held in time.

(*a*) See 3 M. & W. 350.

(*b*) 2 M. & W. 427.

Exch. of Pleas,
1838

CORNER
v.
SHEW.

were assigned, one of which was bad ; and the Court, overruling *Holt v. Scholefield* (a), held that in such a case a venire de novo ought to be awarded, in order that the jury might assess the damages on the good breaches. But *misjoinder* is an objection of an entirely different nature. A demurrer on the ground of misjoinder must of necessity be to the whole declaration (b), and not to the count or breach alone which is misjoined ; and it is equally a ground for arresting the judgment : *Corbett v. Packington* (c). The Court has even refused to allow a plaintiff to cure the defect by entering a nolle prosequi on the count misjoined. In *Witham v. Lewis* (d), the nature of a venire facias de novo is fully explained, and it is laid down by *Willes*, C. J., that it can only be granted in one or other of these two cases ; first, if it appear on the face of the verdict that it is so imperfect that no judgment can be given upon it ; secondly, where it appears upon the face of the record that the jury ought to have found particular facts differently from what they have. *Duncombe v. Wingfield* (e) is an authority to the same effect.

Platt, contra.—In the first place, this application is not too late. [*Parke*, B.—I do not think the Court have any doubt on that point ; no formal arrest of judgment had been entered, and the motion was made in the same term in which the former rule was disposed of.] Secondly, the authorities fully justify the application in the present case. In *Clement v. Lewis* (f), where no damages had been assessed on certain of the issues, the court of error directed an award of a venire de novo ; there it was not disputed that all the counts in the declaration were good. [*Parke*, B.—The ground of that decision was, that the

(a) 6 T. R. 691.

958.

(b) *Kingdon v. Nottle*, 1 M. & Sel. 355.

(d) 1 Wils. 55.

(c) Hob. 262.

(e) 6 B. & C. 268 ; 9 D. & R.

(f) 3 Brod. & B. 297.

jury had misconducted themselves, since they ought to have gone on and assessed the damages. That is clearly a ground for a venire de novo. The question is, whether the award of a venire de novo is not confined to cases either of irregularity in the jury process, or where the jury have in some way misconducted themselves.] The objection to the verdict here is, that instead of finding general damages, the jury ought to have found separate damages on each count, and the plaintiff might then have entered a remittitur of damages on the counts misjoined. If there had been one good and one bad count, a venire de novo would have been grantable, in case the jury had omitted to sever the damages; *Leach v. Thomas*: and the plaintiff ought not to be in a worse condition from having joined, although erroneously, two good counts, than from having placed on the record a good and bad count together. The ground on which the venire de novo issues in that case is, that the Court are incompetent to sever the damages; that equally applies in the present case. Among the instances stated by Mr. Tidd, in which a venire facias de novo is grantable (a), he mentions cases "where the jury give general damages on a declaration consisting of several counts, and it afterwards appears that one or more of them is defective." [*Parke, B.*—You must contend that it is the duty of the jury in all cases to find separate damages on each count: that if they omit to do so, and it afterwards appears that there is a misjoinder, the verdict is defective, and must be taken anew. In truth, you must assume for the purpose of your argument, that each count contains a separate cause of action, and that the jury are bound to form a judgment on each. The point is however new, and is worth consideration.]

Exch. of Pleas,
1838.

CORNER
v.
SHEW.

Cur. adv. vult.

(a) Tidd's Pr. 922, 9th ed.

Exch. of Pleas,
1838.

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CORNER

v.
SHEW.

The judgment of the Court was subsequently delivered
by

PARKE, B.—In this case a rule was pronounced, in Hilary Term last, to arrest the judgment, on the ground of misjoinder of counts, two being against the defendant in his own right, and one against him as executor. During the same term, a rule nisi was obtained to vary the former rule, and for a venire de novo to issue, and cause was shewn against the rule.

One objection was, that the applicant came too late after the former rule pronounced; but the Court disposed of that objection on the argument.

The other was, that a venire de novo could not be awarded in such a case. It had been decided in *Leach v. Thomas*, that where general damages are assessed on a declaration containing one breach ill assigned, a venire de novo ought to be awarded; a question which, before that time, has been considered doubtful, as there were apparently conflicting authorities upon it; yet it is remarkable that such a doubt should exist, as this case had been provided for by an ancient rule of the King's Bench, Michaelmas Term, 1654, which states that, "where a verdict finds entire damages, where damages are the principal, and part not actionable, the judgment may be arrested; yet, by a rule of Court, a venire facias de novo may issue, as upon an ill verdict, and upon the new trial, the party may sever his damages:" and a similar rule exists, of the date of 1654, in the Common Pleas, which was acted upon in that Court, in the cases of *Smith v. Howard* (a), and *Auger v. Wilkins* (b): and see *Eddowes v. Hopkins* (c).

But it is admitted, that there is no precedent of such a proceeding, when there is misjoinder of counts, and the damages have not been severally assessed; and judgment

(a) Barnes, 478.

(b) Id. 480.

(c) Dougl. 375.

has been arrested absolutely in some reported cases. It was done in *Corbett v. Packington* (a); and judgment was reversed for a similar objection in *Herrenden v. Palmer* (b). No question appears to have been raised in either case as to the right or duty of the Court to award a venire de novo, and therefore none of these cases are decisive authorities upon this question; but the absence of any intimation in the cases or books (and we have not been able to find any) as to the power to grant a venire de novo in such a case, makes us pause before we adopt this proceeding. The difference between this case and that provided for by the rule of Court, and sanctioned by the decision in *Leach v. Thomas*, is slight; still there is a difference in the principle, and we do not feel ourselves, in the absence of all authority, warranted in disregarding it.

Exch. of Pleas,
1838.

CORNER
v.
SHEW.

A venire de novo can only be granted on what appears to the Court on record; and unless the record warrant it, it will be error to grant it; and it proceeds (where the jury have been regularly summoned and impannelled) on a suggestion of their misbehaviour: *Lewis d. Earl of Derby v. Witham* (c). Where there is an imperfect or defective verdict, on which, if perfect, the Court could give judgment, the jury have misconducted themselves; and the case of a general assessment of damages on a declaration, with a bad count or breach, may fall within this rule; for it may be presumed that the jury were instructed as to the law, and told to disregard the part of the declaration which was not actionable, or to assess the damages severally; and in such a case an award of venire de novo may be made, "as on an ill verdict," to use the language of the old rule. In that case, the verdict, if good, and confined to the good count or breach, or capable of being applied to it, would at once authorize and require a verdict

(a) 6 B. & Cr. 268.

(b) Hob. 88.

(c) 2 Stra. 1185; affirmed in
Dom. Proc. 1 Wils. 55.

Exch. of Pleas,
1839.

CORNER
v.
SHEW.

for the plaintiff; and the Court ex officio would be bound to award it, overlooking the bad count or breach. But where the counts are both good, but misjoined, the jury ought to assess the damages on all the counts. Each is actionable; and, but for the misjoinder, judgment might be given on each; and if the damages had been assessed on each severally, that would have been of no avail, for the Court could not have given any judgment at all ex officio; and further acts of the plaintiff, in releasing the damages on one or the other counts, would be necessary. If indeed it were a matter of discretion in the Court to grant or refuse such a writ, it would admit of a question, whether it would not be reasonable to do it, in order to enable the plaintiff to make an election which he had omitted to make at the proper period before; and in that case, it would be fitting also to consider whether he ought not to pay the costs of such a proceeding. But it is clearly a matter of duty on the Court to grant the writ or to refuse it; an improper refusal is a ground of error, and it cannot well be error in the Court to refuse a writ, the granting of which would not necessarily enable the Court to give a judgment one way or the other.

For these reasons, we think that the rule must be discharged.

Rule discharged.

AYREY and Another v. FEARNSIDES and Others.

Held, that a paper, whereby the defendants promised to pay the plaintiffs, or order, the sum of 13*l.*, for value received, with interest at 5*l.* per cent.,

and all fines according to rule, could not be declared on as a promissory note.

The jury having found general damages on a declaration containing a count on the above instrument (as a promissory note), and a count on an account stated, the Court awarded a venire de novo.

DEBT on an instrument (declared on as a promissory note) whereby the defendants jointly and separately promised to pay to the plaintiffs, or order, the sum of 13*l.* on demand, for value received, with interest at 5*l.* per cent., "*and all fines according to rule.*" There was also a

count on an account stated. The defendant pleaded to the first count, payment; to the second, *nunquam indubitatus*; and at the trial, before the under-sheriff of Yorkshire, the plaintiff had a general verdict.

Exch. of Pleas,
1838.

AYREY
v.
FEARNSIDES.

W. H. Watson having obtained a rule nisi to arrest the judgment, on the ground that the instrument declared on could not be considered as a promissory note within the statute, but only as an agreement, for which no consideration was shewn in the declaration.

Wightman shewed cause.—The words, “and all fines according to rule,” are altogether insensible, and may be rejected as surplusage; their presence, therefore, does not vitiate the instrument, which, in all other respects, is a complete promissory note. It was certainly held in *Smith v. Nightingale* (a), (which appears to be the nearest case to the present), that an instrument whereby the party promised to pay a sum certain, “and also all other sums that might be due,” was not a promissory note within the statute. But there, the last words, although not capable of any definite construction, were not so insensible as that they could be rejected as surplusage, since they shewed that some more money was due, only they did not specify the amount with sufficient precision. But here, the words do not import any promise to pay money; and there is nothing to shew what they have reference to, or what is the nature of the fines spoken of. Besides, the instrument must be either a promissory note or an agreement at common law; and it clearly is not the latter: for the words in question have no intelligible meaning in themselves, neither could evidence be admitted to explain them *aliunde*, if they were declared on as a contract.

Watson, in support of the rule.—It does not follow that, because the precise amount or even nature of the

(a) 2 Stark, N. P. C. 375.

Exch. of Pleas,
1838.

AYREY
v.
FEARNSIDES.

finer referred to is not specified, the words can be rejected as surplusage. If any construction can by possibility be put upon them which can make them sensible, they cannot be rejected; and it is plain that they may refer to *money* due for pecuniary forfeitures, as, for instance, for violation of the rules of a benefit society, of which the parties were members. *Smith v. Nightingale* is directly in point. There Lord *Ellenborough* says, "The instrument is too indefinite to be considered as a promissory note, for it contains a promise to pay interest for a sum not specified, and no otherwise ascertained than by reference to the defendant's books; and, since the whole constitutes one entire promise, it cannot be divided into parts." So here, the instrument contains a promise to pay some amount not specified, and not to be ascertained but by extrinsic evidence.

PARKE, B.—This instrument being declared on as a promissory note, the question is, whether the words, "and all fines according to rule," can be rejected as being altogether insensible, and therefore mere surplusage: and I think they cannot. It is quite possible that they have a meaning, and may import that certain pecuniary fines or forfeitures are to be paid by the defendants; and if so, this is certainly no promissory note within the statute, but is a specific agreement to do certain things, the consideration for doing which not being stated, the declaration is clearly bad. The judgment will not, however, be arrested altogether, but on the authority of *Leach v. Thomas* (a), which was confirmed this morning by the whole Court in the case of *Corner v. Shew* (b), a venire de novo must be awarded.

Rule accordingly.

(a) 2 M. & W. 427.

(b) Ante, p. 163.

1838.

DOE *d.* DAVIES *v.* MORGAN.

E. v. WILLIAMS shewed cause against a rule which had been obtained by *R. V. Richards*, for a review of the taxation in this cause. It appeared that after the witnesses had been subpœnaed, but before the cause was entered for trial, the cause was referred at the assize town, by agreement of the parties, and an arbitration bond entered into, (but without any clause enabling the parties to have it made a rule of Court :) and the witnesses were then countermanded. The reference ultimately went off, and the cause was tried at the subsequent assizes, when the plaintiff had a verdict. The Master allowed him the costs of the abortive reference, and of the subpœnas to the witnesses.

Where a cause was referred before trial, and an arbitration bond entered into, but which could not be made a rule of Court, and the reference proving abortive, the cause was afterwards tried:—*Held*, that the successful party was not entitled to the costs of the abortive reference as costs in the cause.

PARKER, B., after referring to the Masters, said, that the costs of the reference could not be costs in the cause, inasmuch as it was only by agreement, which could not be made a rule of Court: it must be treated to all intents and purposes as an ordinary arbitration by bond, and the parties be left to their remedy on the bond, if they had any. As to the subpœnas, the Master certified that the plaintiff was entitled to the costs of them.

Rule absolute.

ATTORNEY-GENERAL *v.* BOUWENS and Others.

THIS was an information against the defendants for non-payment of probate duties, tried before Lord Abinger, governments, of which a testator, dying in this country, was the holder at the time of his death, and which have come to the hands of his executor in this country; such bonds being marketable securities within this kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of this kingdom in order to render the transfer of them valid.

Probate duty is payable in respect of bonds of foreign

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

C. B., at the Sittings after last Hilary Term, when a special verdict was taken by consent, which stated in substance as follows:—

Mary Pelham, in the information mentioned, on the 26th day of March, 1836, made her last will and testament in writing, and duly executed, and thereby devised and bequeathed all her estate and effects, goods and chattels, and all her property of every nature and kind whatsoever, to certain persons in the said will mentioned: and also thereby nominated and appointed the defendants executors and executrix thereof. The said Mary Pelham died on the 30th day of March, 1837, without revoking or altering her said will, and the defendants, on the 27th of April, 1837, proved the will in the Prerogative Court of Canterbury, and took upon themselves the burden of the execution thereof.

The said Mary Pelham was at the time of her death, and for three years next preceding, resident in Connaught Place, in the parish of Paddington, in the county of Middlesex, and within the jurisdiction of the said Prerogative Court, and at the time of her death was possessed of personal estate and effects to the amount of 38,509*l.* 3*s.* 1*d.* A large part of the said personal estate, amounting to the sum of 7,377*l.* 13*s.* 7*d.*, was as follows: that is to say, 880*l.* 2*s.* 9*d.*, parcel of that sum, consisted of six written instruments called Russian Bonds, and of other written instruments thereto attached, and called dividend warrants, whereof at the time of her death she was the holder. The following is a copy of one of the said Russian Bonds:—

“ Five per Cent. Annuity.

“ No. 70,818.

Anno 1822.

No. 16,616.

“ Certificate of a perpetual annuity in the Great Book of the Public Debt of the Imperial Commission of the Sinking Fund, representing a capital of 6,720 silver roubles, equal to pounds sterling 1,036.

“ Entered the 1st March, 1822.”

“ Book 1. Folio 276, 2d Series. Letter C. *Exch. of Pleas, 1838.*

“ The bearer of this certificate is entitled to an annuity of 336 silver roubles, payable half-yearly, at his option, in St. Petersburg or London, namely, 168 silver roubles on the 1st day of March, and 168 silver roubles on the 1st day of September ; if in St. Petersburg, in silver roubles of the weight and standard now current ; if in London, at the rate of 3s. 1d. sterling per silver rouble, in both instances on presentation of the dividend warrant then due. The bearer of this certificate, on application to the Commissioners of the Sinking Fund, may cause it to be converted into an inscription in the Great Book in his own name, or that of any other person or persons whom he shall designate ; in which case the dividends will be payable in St. Petersburg only, at the periods above mentioned ; and the transfer or cession of such inscription must be made according to the existing regulations. Twenty-four dividend warrants are hereunto attached : if, when the last becomes payable, the capital has not been redeemed, or inscribed in the Great Book, twenty-four similar warrants will be issued, and so forwards, and in such manner as to secure to the holder of this certificate the due payment of the annuity in St. Petersburg or London.

ATTORNEY-
GENERAL
v.
BOUWENS.

“ N. B.—A special fund of one per cent. on the amount of this loan is appropriated for its redemption.”

“ Extract from the Regulations of the Commission, Chap. 2.

“ Sec. 22.—The payment of the perpetual annuity, as well as the payment of the outstanding debts, will be effected in time of peace as well as in time of war, without distinction, whether the creditor belongs to a friendly or a hostile nation.

“ Sec. 23.—If a foreigner, proprietor of the inscription, dies intestate, the inscription shall pass to his heirs, in

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

the order of the succession established by the laws of the country of which he was a subject.

“ Sec. 24.—The capital placed in the perpetual debt, being considered as an inviolable property, shall be exempt from sequestration, both for claims of the Crown and those of individuals, unless these capitals in whole or in part have been given in security for contracts of provisions, or by any other articles of agreement, whether with the Crown or with private individuals, or for the purpose of bailing any claim, in which case they are subject to the general laws concerning mortgages and bails. These capitals are likewise exempted in all cases from every tax.

“ Sec. 25.—No person can be restrained to take back the whole or part of the capital placed in the perpetual debt. But to facilitate to the proprietors of inscriptions the means of converting them, when they desire it, into ready money, the Commission will employ annually, for the purpose of repurchasing them at the current price, a capital of the Sinking Fund, which shall be assigned beyond the fund necessary for the payment of the perpetual interest.”

£947 17s. 6d., other parcel of the said sum of 7,377l. 13s. 7d., consisted of thirteen bonds or writings obligatory, called Danish Bonds, respectively signed with the sign manual of the King of Denmark, and sealed with the great seal of the kingdom of Denmark, whereof the said Mary Pelham was holder at the time of her death; and one of which is as follows:—

“ We, Frederick the Sixth, by the Grace of God, King of Denmark, &c. &c.

“ We do declare and make known by this our general bond, for us and our heirs and successors to the Crown, to all whom it may concern, that having resolved, in order to enable our treasury to pay off more ancient loans at a higher rate of interest, to raise a loan bearing interest at

3 per cent. per annum, and such loan having been accordingly contracted for in our name and for our account with the bankers, Thomas Wilson & Co., of London, through our Privy Counsellor of Legation, Frederick Adeler Ployen, Knight of the Danebrog, which has been sanctioned by us, and the said bankers having now placed at the disposal of our treasury the amount to be paid by them according to the 3rd and 4th articles of the contracts entered into; we now give the present general bond for us, and our heirs and successors, and we do hereby authorize and direct our directors of these public debts and sinking fund to grant for the amount of this general bond the following special bonds payable to bearers, which bonds are to be countersigned by Messrs. Thomas Wilson & Co., viz:—

A. No. 1. to 25,000	25,000 Bonds of £100 each	£2,500,000
B. . . 1. . . 2,000	2,000 .. 250 ..	500,000
C. . . 1. . . 1,000	1,000 .. 500 ..	500,000
D. . . 1. . . 2,000	2,000 .. 1,000 ..	2,000,000
		<hr/> £5,500,000

And the said special bonds are to be provided with sixty half-yearly dividend warrants, and at the expiration of thirty years with sixty more, so as to secure the dividends for sixty years from the 31st day of March last on each special bond respectively. Although this our general bond is made for 5,500,000*l.* sterling, and the securities we have pledged for the redemption of the capital and payment of the interest are more than adequate for that purpose, we hereby declare that the purchase of only a sum of 3,500,000*l.* has been contracted for with the bankers, Thomas Wilson & Co., the remaining 2,000,000*l.* being held by us to be sold whenever we, our heirs and successors, may deem expedient.

“And we engage for ourselves, and for our heirs and successors, that the interest on the said special bonds shall be paid in London by our agents, Thomas Wilson & Co.,

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

at the rate of three per cent, per annum, from the 31st day of March of the present year, in half-yearly payments, to commence on the 30th of September of the present year, and to continue every 31st of March and 30th of September of each succeeding year, on presentation of the dividend warrants when due, and free from all expense to the holders of the same. The amount of the dividend warrants, which may remain unclaimed beyond the term of six months from the dates at which they shall respectively have become due, shall after that period be left in the hands of the banking-house to whom such payments shall have been committed for the account and risk of the bond-holders, without further liability on our part.

“We further engage for ourselves, and our heirs and successors, that the said special bonds shall be repaid or extinguished by purchases, within the period of sixty years from the 31st of March last. For this purpose, we engage that a sinking fund shall be created, of at least one half per cent. on the amount of the whole of the said special bonds, the which, with the accumulating interest on the bonds redeemed, shall be annually applied, as heretofore provided, to the redemption of the loan, to begin from and after the 31st of March last.

“We reserve to ourselves, and to our heirs and successors, the right of purchasing special bonds to any greater extent than above mentioned, and also to pay off the whole or any part of the loan at 100% per cent., on giving six months’ notice thereof in the London Gazette.

“And, inasmuch as the under-mentioned securities were pledged by general bond, of the 10th day of November, 1821, for the redemption of a five per cent. loan, contracted with the bankers, A. F. Haldimand and Sons, for three million pounds sterling, of which loan there remain in circulation bonds for 1,330,000%, the which we have directed to be paid off out of the proceeds of the present three per cent. loan, (public notice to that effect having been

given by our envoy extraordinary in London), by which payment these securities will be released, and entirely at our disposal. Now we hereby declare, that such part of the said securities as are already released, and the whole, when released by the payment above mentioned, are and shall be pledged as a security for the redemption of the said special bonds, and payment of the interest that may be due thereon, to the creditors at large, in our name, and for our heirs and successors to the Crown, specifically and exclusively, viz:—

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

“1. The whole of the revenues arising from our tolls of the Sound or Sound dues, and all other profits and emoluments, arising from that source of revenue.

“2. The mortgages and other securities on the West India plantations, for money advanced by us to the planters and proprietors of estates.

“3. The net revenue of our West India Islands of St. Thomas, St. Croix, and St. Johns: the produce of which three heads of revenue has for six years, upon an average, exceeded the sum of 250,000*l.* sterling, annually. The specification of these revenues is to be annexed to the contract ratified by us, and we have ordered to be delivered over as a security or mortgage, documents duly executed of the revenues above mentioned, which are to be deposited for safe custody in the Bank of England, together with this our general bond, under the seals of our envoy extraordinary and minister plenipotentiary for the time being, of the bankers, Thomas Wilson & Co., and of a notary public: and we further pledge by these presents, all other revenues of our states, save those already specifically assigned for other purposes.

“In the redemption of the loan, the following plan is to be adopted:—The special bonds to be purchased in London, are, on each 31st of March and 30th of September, or as near thereto as practicable, to be marked as belonging to the sinking fund, and to be deposited in the Bank of

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

England, in the presence of our ambassador or envoy for the time being in London, of our agents, Thomas Wilson & Co., and a notary public, until the whole loan is repaid : on the expiration of each period of re-purchase, the numbers and amounts of the special bonds so deposited are to be published in the London Gazette.

“ We reserve to ourselves, and to our heirs and successors, the right, when part of the special bonds are paid off, to reclaim a proportionate part of the securities for the same ; the revenue arising from our West India Islands to be first restored, and then the mortgages on the West India estates.

“ We hereby declare ourselves, and our heirs and successors, debtors to all those who shall be holders of the said special bonds respectively, for the amount expressed in each special bond. And we acknowledge ourselves, and our heirs and successors, bound to every person who shall, for the time being, be a holder of one or more of those special bonds, for the punctual payment of the principal and interest of each, according to the tenor thereof.

“ We further hereby bind ourselves, and our heirs and successors, to the performance of all the foregoing engagements in the most solemn manner, and do declare that no judicial plea whatever, privilege in suits, or any pretence, shall avail us, or our heirs and successors, in pleading and counterpleading, all which we formally and deliberately renounce, as well as any plea, by whatever title it may be called, and which is contrary to the tenor of this our general bond.

“ In faith of which we have signed the present general bond with our sign manual, and have caused our great seal to be fixed to the same.

“ And it is further to be countersigned by our Directors of the Public Debts and the Sinking Fund.

“ Done in the capital of Copenhagen this eighth day of June, one thousand eight hundred and twenty-five.

“ WILBRECHT.”

“ This is to certify that the bearer hereof is entitled to one hundred pounds sterling, part of the loan secured by the above general bond of His Majesty the King of Denmark, and the interest thereon, value having been duly paid to the Denmark Government for the same.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

“ His Royal Majesty’s undersigned Directors of the Public Debts and the Sinking Fund, declare this to be a special bond, granted in conformity to the engagements of His Majesty contained in His Majesty’s general bond, of which the above is a copy.

“ Copenhagen, in the direction of the Public Debts and the Sinking Fund, the 8th of June, 1825.”

And 555*l.* 13*s.* 4*d.*, residue of the said sum of 7377*l.* 13*s.* 7*d.*, consisted of 114 written instruments, called Dutch Bonds, and of certain other written instruments accompanying the same, called coupons, whereof the said Mary Pelham was the holder at the time of her death. The said Dutch Bonds are in the Dutch language, and the following is a literal translation of one of them:—

“ Debt yielding Interest.

“ Certificate.

“ No. 22,194.

“ The holder of this is entitled to a capital of thousand guilders, yielding an interest of 2½ per cent. in the year, to commence from this day, and for which, as appears by the subjoined registration, a like sum has been entered in the ledger of the national debt, yielding interest, in the name of the office of Administration, under the direction of

“ BRONDGEEST and SON,

“ CHRISTAAN BRUNTING,

“ JACOBUS CHEMET, and

“ A. & C. VORTMAN,

established at Amsterdam and at Utrecht; which capital may at all times be disposed of according to section E.,

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

art. 15, of the common notice, dated the 22nd of August, 1814, on returning this certificate with the coupons which have not yet become due.

“ Amsterdam and Utrecht, the

“ 1st of January, 1815.

(Signed), “ BRONDGEEST and SON,

“ Capital, £1000.

“ CHEMET, WEETJEN, and

“ Fol. 61.

“ A. & C. VORTMAN.

“ Shewn and registered by the direction of the Ledger of the National Debt, Amsterdam, the 30th of January, 1834.

“ Coupons delivered
up to January, 1833,
with vouchers for
further delivery.”

(Signed),

“ V. D. WAL, Verifier.”

The said Russian, Danish, and Dutch bonds respectively were and are, and always have been, marketable securities within this kingdom, and always have been sold and transferred within this kingdom by delivery only, and the bearers thereof have always been deemed and reputed to be, and have always been dealt with as being, legally entitled to the principal monies secured by the said bonds respectively, and to the interest or dividends from time to time arising or accruing in respect of the same. It never has been nor is necessary to do or perform any act whatsoever out of the kingdom of England, in order to render a transfer of any of said bonds valid; and the bearers of the said bonds respectively have always been treated and dealt with by the agents of the empire of Russia, and of the kingdoms of Holland and Denmark, as the persons duly entitled to the principal monies secured by the said bonds respectively, and the interest or dividends thereof; and such agents have always paid all monies due and payable for and in respect of the said bonds respectively,

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

be granted, was sworn by the defendants to be under 35,000*l.*, and that they paid the probate duty in respect of that sum; but that the said sum of 7,737*l.* 13*s.* 7*d.*, so vested in the said bonds, was not included in the said sum of 35,000*l.*, and that the probate duty thereon amounted to 75*l.*, which had been demanded from the defendants, but remained unpaid.]

The points marked for argument were as follows:—

On the part of the Attorney-General:

The Attorney-General claims the payment of duty under the 55 Geo. 3, c. 184, sched. part 3, title “Probate,” and intends to argue that the facts disclosed in the special verdict shew, that the said Russian, Danish, and Dutch bonds therein mentioned were respectively liable to probate duty in the hands of the defendants, the executors and executrix of Mary Pelham, because at the time of her decease they formed part of her personal estate within the jurisdiction of the Prerogative Court of Canterbury, by which court probate of the will of the said Mary Pelham was granted.

On the part of the defendants:

The defendants will contend that probate duty is not payable in respect of any of the securities mentioned in the special verdict.

That such securities, being evidence only of debts due to the testator’s estate from debtors out of the jurisdiction of the spiritual court, are not any estate or effects within the meaning of the statute 55 Geo. 3, c. 184, or any other act or provisions relating to the payment of probate duty.

That such securities must, in reference to such duty, be taken as and deemed to be property in a foreign country, and only legally available there.

The case was argued early in this term, by

The *Solicitor-General*, for the Crown.—The only real question in this case is, whether it falls within the author-

ity of the cases of *Attorney-General v. Dimond* (a) and *Attorney-General v. Hope* (b), the latter of which was determined in the House of Lords, and must, of course, be deemed a binding authority. In the *Attorney-General v. Dimond*, it was held that probate duty was not payable in respect of French rentes, belonging to a testator dying in this country, although the property was brought into and administered in this country by the executor. In the *Attorney-General v. Hope*, the same was held with respect to monies standing in the testator's name in the public funds or stock of the United States of America. With respect to the latter case it may be observed, that it was decided in some degree with reference to certain information communicated to the Lord Chancellor, as to the existing practice of the Ecclesiastical Courts in respect to the grant of probate, which information appears from the case of *Spratt v. Harris* (c), subsequently reported, to have been erroneous. It must now, however, be admitted, that no probate duty would be payable under the circumstances stated in the *Attorney-General v. Dimond*, and the *Attorney-General v. Hope*. But the present case is clearly distinguishable from those. Here it appears on the face of the special verdict, that all these bonds are marketable securities within this kingdom, and saleable and transferable by delivery only, and that it is not necessary for the holder to do any act out of the kingdom, in order to render the transfer valid; that the principal and interest are payable by the respective foreign governments by which they were granted, to the bearers; and further, that the defendants have actually sold them in the market. The grounds of decision in the former cases were, that the duty was payable in respect of the property in respect of which probate was granted, and

Exch. of Pleas,
1833.

ATTORNEY-
GENERAL
v.
BOUWENS.

(a) 1 C. & J. 356.

(b) 1 C. M. & R. 530; 8 Bligh, 44.

(c) 4 Hagg. 405.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

that the probate could only be granted in respect to property which was within the jurisdiction of the Court of probate; and therefore the French rentes, which were receivable and transferable only in France, and the United States' Stock, which was receivable and transferable only in America, were not property in respect of which the probate was granted. But these bonds *were* property in respect of which the probate was granted. Suppose an action had been brought against the executors, to which they had pleaded plene administraverunt, and had given proof of administration of all the assets except these bonds, and it were proved that they had sold them after the testatrix's death, and possessed themselves of the money obtained for them—could it be said that they had proved their plea? [Lord *Abinger*, C. B.—Would not that equally apply to the French rentes?] After the sale of them by the executors, probably it would, since the proceeds would be property of which they had possessed themselves as executors, although not by virtue of the probate. But here they never could plead plene administraverunt so long as they had in their possession the bonds themselves, being valuable property, saleable within the jurisdiction of the court of probate. Suppose they had been in the hands of a banker at the time of the testatrix's death, and the executors had demanded them, but the banker had refused to deliver them up; the executors clearly could have maintained trover to recover them; but they could not do that without payment of the probate duty in respect of them, since otherwise they would be recovering as executors, under a probate on which, in respect of the property sought to be recovered, no duty had been paid. *Hunt v. Stevens* (a) is a clear authority to shew, that if it appears that an executor or administrator is suing for a greater value than is conveyed by the probate or administration stamp, he shews

(a) 3 Taunt. 113.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

for the amount of the sums mentioned in them, and capable of being dealt with as property here. [*Parke, B.*—You would say the same if the party died possessed of foreign bills of exchange receivable abroad—it is enough that they can be turned into money here.] Undoubtedly, if they were transferable by delivery. The case must often have arisen with respect to Irish bank notes circulating in England, and vice versâ. Suppose a party died possessed of goods in a bonded warehouse, which could not lawfully come into consumption in this country, and could not be made available as assets without sending them abroad—can it be said that the executor ought not to include the value of them in his probate?

On these grounds it is submitted that the case is distinguishable from the former decisions, and that the judgment ought to be for the Crown.

Sir C. Wetherell, for the defendants.—The decisions in the *Attorney-General v. Dimond*, and the *Attorney-General v. Hope*, are conclusive of the present case. The principle laid down in those cases completely governs and covers the present. In the *Attorney-General v. Dimond*, *Lord Lyndhurst, C. B.*, lays it down distinctly, that “the probate is granted in respect of the effects which are within the jurisdiction of the spiritual judge at the death of the testator: the jurisdiction is exercised in respect of those effects only.” And again: “It (the probate) could not be granted for or in respect of this property, because the property was, at the death of the testator, in a foreign country, and consequently out of the jurisdiction of the spiritual judge.” The judgment in that case was fully and elaborately reviewed in the *Attorney-General v. Hope*. What real distinction can there be, either in point of international law or on any application of the *jus civile*, between the case of the stocks now in question, and that of the French rentes and the American stock? The holder

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

property of the debtor: but in what mode could these instruments be sued on here? If this property be held liable to probate, the effect will be to localise in the province of Canterbury debts owing abroad, while that character of locality is denied to debts owing here. Where a simple contract debt is owing by a debtor out of the province of Canterbury, but a judgment is recovered upon it, and entered up in one of the superior courts, that judgment localises the debt, and probate must then be granted by the Prerogative Court: *Byron v. Byron* (a). The principle of all the cases therefore is, that in order to entitle the Prerogative Court to the grant of probate, the debt must have acquired a locality within its jurisdiction; whereas here the instruments are not suable on at all in this country, and the debtors reside not only not within the province of Canterbury, but beyond the four seas. The engagement to pay in London does not vary the nature of the instrument or the species of the debt. *Gorgier v. Mievill* only decides that there may be a property in the papers themselves. *Hunt v. Stevens* has even less application to the present case; there the goods were locally situate within the province; here the whole argument of the defendants is, that the property never was locally within the jurisdiction. The probate duty is altogether commensurate with, since it arises out of, the local jurisdiction. The title under the probate and under the will are wholly different; the former depends on the principle of locality—the latter is universal. The case of exchequer bills is different; they depend for their validity and their saleable character on an act of Parliament, and import a debt receivable from the proper officer of the government in this country, of even a higher nature than a bond. Neither is the case of Irish bank notes payable in England, or the contrary, parallel to the pre-

(a) Cro. Eliz. 472.

sent ; because here the question is how a local situs is to be given to a debt which is owed out of the united kingdom. That question is in effect determined by the cases of the *Attorney-General v. Dimond*, and the *Attorney-General v. Hope*.

Esch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

The Solicitor-General, in reply.—The argument on the other side has been addressed to the single point of the supposed analogy from the cases relating to the question of bona notabilia. But suppose A. died in the diocese of Winchester, having property there, and these bonds were deposited with his banker at Gloucester, would they not be bona notabilia within the diocese of Gloucester, and if his executor sued for them under a Winchester probate, would he not be nonsuited? [*Parke, B.*—Sir *Charles Wetherell's* argument must go to the extent that they are bona notabilia nowhere.] With regard to the case of bills of exchange, relied upon by the other side, in *Yeomans v. Bradshaw* the action was against the drawer, who lived out of the province; the plaintiff, therefore, had no locus standi by virtue of his Durham probate: but if the action had been against a party to the bill who was resident within the jurisdiction by which the probate was granted, it is clear that that would have given the executor a sufficient title to sue. But this is in truth no question of bona notabilia at all: that doctrine has no application as between goods in one province or diocese, and out of the kingdom. The defendants must establish that these instruments have no value in the kingdom, before he can apply the analogy. The duty is not claimed as upon the debts due from the foreign powers, but upon the *available value in this country*. The property depends, not on there being a debt, or quasi debt, but on the certificates being in the possession of the testatrix at her death, and being valuable chattels, transferable by delivery.

Cur. adv. vult.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

On a subsequent day, the judgment of the Court was delivered by

LORD ABINGER, C. B.—The question in this case arose upon a special verdict, on an information against the executors of Mr. Pelham: the point to be decided is, whether probate duty is, by law, payable upon the value of certain written instruments, called Russian, Danish, and Dutch bonds, which were the property of the testatrix, and were, at the time of her death, in the province of Canterbury. The special verdict gives a description of these instruments, which are called, though incorrectly, bonds; and finds that all these were marketable securities within this kingdom, transferred by delivery only, and that it never has been necessary to do any act whatsoever out of the kingdom of England, in order to make the transfer of any of the said bonds valid: that there has always been an agent in England of the Russian and Danish governments, to pay the dividends due on these bonds respectively; but the dividends on the Dutch bonds are payable solely at Amsterdam. All these instruments have been clearly framed with a view to their becoming subjects of sale, and easily transmissible from hand to hand. The special verdict also finds, that all the bonds came to the possession of the executors, as part of the testatrix's personal estate, and were sold and delivered by them, without doing any act out of the jurisdiction of the Prerogative Court, for 7,000*l.* and upwards, which they had received.

By the 55 Geo. 3, c. 184, a certain duty is granted on probates, "in proportion to the value of the estate and effects for and in respect of which such probate shall be granted;" and the law has been settled by the two cases of *The Attorney-General v. Dimond* (a), and *The Attorney-General v. Hope* (b), that the duty is to be regulated, not

(a) 1 C. & J. 356.

(b) 1 C. M. & R. 530; 8 Bligh, 44.

by the value of all the assets which an executor or administrator may ultimately administer by virtue of the will or letters of administration, but by the value of such part as are at the death of the deceased within the jurisdiction of the spiritual judge by whom the probate or letters of administration are granted. The question is, therefore, whether these securities are to be considered as assets locally situate within the province of Canterbury at the time of the testatrix's death.

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

The two cases above cited, decided that the French rentes and American stock, which are part of the national debt of France and America respectively, and are transferable there only, and debts due from persons in America, were not assets locally situated here. But it is contended, and we think rightly, that the property which is the subject of this inquiry is distinguishable, and had a locality in England.

Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them in pios usus. As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death: and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on

Esch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be.

These distinctions being well established, it seems to follow that no ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad, and incapable of being transferred here; and therefore no duty would be payable on the probate or letters of administration in respect of such effects. But, on the other hand, it is clear that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a saleable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate.

In this case, assuming that the foreign governments are liable to be sued by the legal holder, there is no conflict of authorities, for their governments are not locally within the jurisdiction, nor can be sued here; and no act of administration can be performed in this country, except in the diocese where the instruments are, which may be dealt with and the money received by their sale in this country. Let us suppose the case of a person dying abroad, all whose property in England consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subject of commerce, and to be usually sold on the Royal Exchange. The only act

of administration which his administrator could perform *here* would be to sell the bills and apply the money to the payment of his debts. In order to make titles to the bills to the vendee, he must have letters of administration; in order to sue in trover for them, if they are improperly withheld from him, he must have letters of administration, (for even if there were a foreign administration, it is an established rule that an administration is necessary in the country where the suit is instituted) (a): and that these letters of administration must be stamped with a duty according to the saleable value of the bills, the case of *Hunt v. Stevens* (b) is an express authority.

Each. of Pleas.
1838.
ATTORNEY-
GENERAL
v.
BOUWENS.

If this be the law in the supposed case, it is impossible to distinguish it from that under consideration. Here are valuable instruments in England, the subjects of ordinary sale; the debtors by virtue of such instruments, if there are any, resident abroad, out of the jurisdiction of any ordinary, and consequently, there being no fear of conflicting rights between the jurisdictions who are to grant probate. If these were the *only* effects in England of the deceased, (a supposition which would simplify the case), there would be no question as to the necessity of probate, not only to make title to them by sale to any one who knew that they were the property of the deceased, or chose to inquire into the title, but, certainly, in order to sue for them against a wrong doer; against a banker, for instance, who had received them from the deceased and refused to deliver them to the executor or administrator; and the probate must surely be stamped according to the value of the only effects which could be sold, disposed of, or recovered under it. And if this be true, if they were the only effects, it must be true that the duty must be paid on their value if they form part of the effects of the deceased.

(a) Story on the Conflict of Laws, 421.

(b) 3 Taunt. 113:

Exch. of Pleas,
1838.

ATTORNEY-
GENERAL
v.
BOUWENS.

We think, therefore, that in this case these instruments are of the nature of valuable chattels, saleable here, and which can be administered here, and therefore that their amount should be included in the value of the testator's effects.

The Crown therefore is entitled to judgment.

Judgment for the Crown.

HAYWARD v. GIFFARD and GROVE.

This Court will not interfere to make a person who is not a party to the record pay the costs of the action, though he is the real party interested in the event of it.

JERVIS had obtained a rule calling upon one George Spencer to shew cause why he should not pay forthwith to the defendant, Francis Giffard, the sum of 112*l.* 14*s.* 3*d.*, the amount of the taxed costs on the judgment as in the case of a nonsuit in the above cause, and also the costs of the application. The action was brought against the defendant Giffard, as clerk to the Trustees of Tothill Fields, acting under an act of Parliament for paving, lighting, and improving the district called Tothill Fields; and the other defendant, Edward Grove, was and acted as a constable or broker for the trustees in making a distress upon a house in the district, occupied by the plaintiff as tenant to the said George Spencer. The affidavits upon which the rule was obtained stated a variety of facts, for the purpose of shewing that Spencer was the real plaintiff, and not Hayward; and they set forth an admission by the plaintiff's attorney, whereby he agreed to admit on the trial of the cause "that the action was brought by and at the expense of the said George Spencer, and that the said John Hayward was the nominal plaintiff only." The cause, however, did not proceed to trial, but judgment as in case of a nonsuit was signed, and the defendants' costs were taxed at the above mentioned sum of 112*l.* 14*s.* 3*d.*

Rogers shewed cause.—This application, calling upon a person who is not a party to the record to pay the costs of an action after judgment has been signed, is altogether without precedent, and no case of a similar application can be found. Many cases may be found where, in the early stages of a cause, a plaintiff has been compelled to give security for costs : but even in those cases the Courts require the application to be made in the first instance, so as not to allow the party to incur costs. And the reason for such practice is, that thereby the party is prevented from going on and increasing the amount of costs until he has given security for them, which may induce him to consider whether he has any good grounds for proceeding in the action. Here the party ought to have come to the Court immediately after the admission was made, and not have waited until after judgment was signed.—He cited *Adams v. Brown* (a), and *Berkeley v. Dimery* (b).

Exch. of Pleas,
1838.

HAYWARD
v.
GIFFARD.

Jervis and Turner, contra.—In this case, Spencer, the real plaintiff, is seeking, in the name of Hayward, to try a right affecting his property, and ought therefore to be compelled to pay the costs of the action. In cases of ejectment it is frequently done; and in *Doe d. Martin v. Gray* (c), the Court, in an action of ejectment, compelled the real defendant, although he was not the party on the record, to pay the costs. [*Parke, B.*—Those cases proceed on a different ground : that as the landlord was the real defendant, he ought to have entered into the landlord's rule. The defendant should have come to the Court for security for costs.] This is in truth the same as an ejectment, for it is an action to try a right affecting the property of the landlord. There can be no doubt here

(a) 9 Bing. 81 ; 2 M. & Scott, 154.

(b) 10 B. & Cr. 113.

(c) 10 B. & Cr. 615.

Esch. of Pleas,
1888.

HAYWARD
v.
GIFFARD.

that Spencer is the real plaintiff; the attorney in the cause has admitted that he is, and he himself has not ventured to deny it. [Lord *Abinger*, C. B.—What jurisdiction have we over persons who are not parties to the record? We have over attornies and officers of the Court: but in a case where persons are not parties to the record, and have committed no contempt, how could we enforce our order?] It may be enforced by attachment for disobedience to a rule of Court. In *Doe d. Martin v. Gray*, the party against whom the order was made was not a party to the record. In *Hewitt v. Tregonning* (a), an application similar to the present was made in an action of trespass, and although *Littledale*, J., refused the application, it was because he did not think the affidavit was sufficient to warrant his interference; but he did not appear to have any doubt as to the jurisdiction of the Court.

LORD ABINGER, C. B.—If we were at liberty to consult equity and justice, we should probably make this rule absolute. But the authority of the Courts at Westminster is derived from the Queen's writ, directing them to take cognisance of the suits mentioned in the writs respectively, and thus bringing the parties before them. This being so, they have no power to order any particular individual to come before them at their pleasure. In the present case, if it could have been shewn that Spencer had committed any contempt of Court, or been guilty, in respect of this suit, of any thing in the nature of barratry or maintenance, it would have been another matter; but we cannot make any order against an individual who is not party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit. However anxious, therefore, we might be to make this rule absolute, by doing so we should establish a precedent which

(a) 5 Dowl. P. C. 404.

might open a wide sea to injustice. The cases where the Courts have interfered in this way are cases of exception. They are cases where application is made for security for costs, and even there the order is made in the cause, and the immediate thing commanded is a stay of proceedings, by which means the ulterior object of a security for costs is obtained. So in ejectment, which is a fictitious proceeding, the Courts allow the action to be brought in the name of a nominal plaintiff, and allow the landlord to come in and defend, but they take notice of the real parties litigant. Those are the excepted cases, but the general rule is, that courts of justice have no power except over parties to the record.

Book of Pleas,
1838.

HAYWARD
v.
GIFFARD.

PARKE, B., concurred.

Rule discharged, without costs.

MAY v. PIKE.

PIKE had obtained a rule to set aside the judgment signed by the plaintiff in this cause, for irregularity.—It appeared from the affidavits, that there was no attorney for the defendant on the record, and that the plaintiff had entered an appearance for the defendant according to the statute; but that a Mr. Dickenson had accepted the declaration as the defendant's attorney, and had taken out a summons for leave to plead several matters, and had been treated as the defendant's attorney by the plaintiff. A second summons for leave to plead several matters was taken out by another attorney, and there being no rule for changing the attorney, the plaintiff treated this as a nullity, and the previous time for pleading being out, he signed judgment for want of a plea.

Where an attorney has accepted a declaration, and has acted and been treated by the plaintiff as the attorney in the cause, another attorney cannot proceed with the action without a rule for changing the attorney, although the former attorney's name was not upon the record.

Exch. of Pleas,
1838.

MAY

v.
PIKE.

Blair shewed cause, and contended that as there was no rule for changing the attorney, the plaintiff was justified under the circumstances in signing judgment.

Pike, contra, cited *Wells v. Secret* (a) as an authority that the summons operated as a stay of proceedings, and that until after the return of the summons, no judgment ought to have been signed. He also contended, that as there was no attorney on the record, no rule to change the attorney was necessary.

PER CURIAM.—Mr. Dickenson had acted in the cause up to a certain time, and he could not be changed without a rule for that purpose. It was necessary to obtain a rule to change the attorney, as he had accepted a declaration. The Court, however, made the

Rule absolute, on payment of costs.

(a) 2 Dowl. P. C. 477.

GOODE and Another v. HOWELLS.

The same notice is requisite to determine a yearly composition for tithes, as in the case of a tenancy of lands, namely, six months' notice, ending at the expiration of the year of composition.

Where a party held tithes under a yearly composition, commencing at Michaelmas, some of the tithes being payable in May, and on the 24th March he gave the tithe-owner notice that he intended "from henceforth" to set out the tithes in kind:—*Held*, that this notice could not enure to determine the composition from the Michaelmas following, but that it was altogether inoperative.

THIS was an action of assumpsit, to recover the sum of 11*l.*, claimed to be due from the defendant to the plaintiffs, as half a year's composition for tithes, due at Michaelmas 1836. The defendant pleaded the general issue. At the trial before *Coltman*, J., at the last Carmarthenshire assizes, it appeared that the plaintiffs were farmers of the tithes of the parish of Llanfihangel Abercowin, in that county, and that the defendant had for several years compounded with them for his tithes, for the sum

of 22*l.* a year. The tithes of wool were payable in May. On the 24th of March, 1836, the defendant, (who had previously given a six months' notice to determine the composition at Lady-day), gave a written notice to the plaintiffs that he intended "from henceforth" to set out his tithes in kind. The plaintiffs gave clear evidence on the trial to shew that the holding was from Michaelmas. It was contended for the defendant that the latter notice was nevertheless good, and was sufficient to determine the composition at Michaelmas. The learned judge inclined to that opinion, but reserved the point, and left the case to the jury on the question, whether the holding was for Michaelmas or Lady-day: and the jury found for the defendant.

Erech. of Pleas,
1838.

GOODE
v.
HOWELLS.

Chilton having obtained a rule nisi for a new trial, on the ground that the verdict was perverse, (and the learned Judge having so reported),

Evans and *Nicholl* now shewed cause.—Assuming that the jury came to an improper conclusion on the question of fact left to them, there ought not to be a new trial, for the composition was duly determined by six months' notice, expiring at Michaelmas. The notice to determine the composition *from henceforth*, means, as soon as it can legally take effect. It could not possibly operate on the tithes of the current year. [Lord *Abinger*, C. B.—It purports to do so: it applies in terms to all tithes thereafter due. *Alderson*, B.—If you are to determine a contract, you must inform the other party when his rights are to begin. Suppose a tenant gave notice to quit *forthwith*, would that be good? *From henceforth* means the same.] In the first place, it is very questionable whether, in the case of the occupation of tithes, six months' notice is necessary. The case of *Hewitt v. Adams* (a), which is generally cited as the authority for that position, did not

(a) 7 Bro. P. C. 64.

Exch. of Pleas,
1838.

GOODE
v.
HOWELLS.

expressly decide that the cases of the occupation of tithes and of land were in this respect analogous, but only that twenty-one days was not a sufficient notice; and in *Wyburd v. Tuck* (a), *Eyre*, C. J., still strongly questioned the analogy of tithes and land in this respect. So, in *Fell v. Wilson* (b), where the question arose whether a proper notice had been given, the Court carefully abstained from saying that six months' notice was necessary, or that that was established by the judgment in *Hewitt v. Adams*. In *Hulme v. Pardoe* (c), *Graham*, B., also says: "I am not prepared to determine that six months' notice from the end of the defendant's holding should have been given." In *Leech v. Bailey* (d), the plaintiff, the tithe-owner, about July 1814, the usual time of taking the tithe, and of his settlement with the parish, gave notice to the parishioners that, *for the time to come*, he should require the tithes of lamb, hogs, wool, agistment, turnips, and potatoes, to be paid to him in kind. That was held a sufficient notice, although the next year's tithes began from that very time to accrue due.

But supposing the same period of notice to be requisite as in the case of the occupation of land, this was a sufficient notice. Supposing it had been "as soon as I lawfully may,"—would not that have been good? The defendant intimates his intention to determine the composition for ever thereafter, so far as he legally can; and although it cannot apply to the current year, it may enure for the subsequent year, when it may legally take effect. In *Doe d. Lord Huntingtower v. Culliford* (e), a notice dated the 27th and served on the 28th of September, requiring a tenant to quit "at Lady-day next, or at the end of his current year," (the current year in fact expiring at Michaelmas-day), was held to be a good six months' notice, on the

(a) 1 Bos. & P. 458.

(b) 12 East, 83.

(c) M'Clel. 393; 13 Price, 684.

(d) 6 Price, 506.

(e) 4 D. & R. 248.

ground that the landlord could not possibly have intended to give a two days' notice, which would have been wholly inoperative. There the Court proceeded altogether on the *intention* of the party, against the strict construction of the instrument. On the same ground, in *Doe d. Duke of Bedford v. Keightley* (a), a notice given at Michaelmas, 1795, to quit "at Lady-day, which will be in the year 1795," was held a good notice for Lady-day 1796. In *Doe d. Williams v. Smith* (b), where land and buildings were held, the land from the 2nd of February, and the buildings from the 1st of May, and the landlord, on the 22nd of October, 1833, gave the tenant notice to quit the land and buildings "at the expiration of half a year from the delivery of that notice, or at such other time or times as his *present* year's holding of or in the premises, or any part or parts thereof respectively, should expire, after the expiration of half a year from the delivery of that notice"—the Court rejected the word "present," in order to carry into effect the intention of the party, and held it a good notice to quit on the 2nd of February, 1835. The only fault of the notice here is that it includes too much. [*Parke, B.*—Suppose a tenant of land, on the 24th of March, gave this notice—"I hereby give you notice that I intend to quit and deliver up the farm I now hold of you,"—without more; would that be a good notice for Michaelmas? Such a notice only can be good as, on a reasonable construction of it, denotes an intention to give up the premises at the lawful time.] That is not an analogous case to the present: the landlord there would have no means of knowing when the tenant meant to quit. But here the subject-matter of the holding being tithes and not land, the notice means that he intends henceforth—that is, in each and every coming year, to render the tithes in kind. It may not be good for the current year, but, on the

Exch. of Pleas,
1888.

GOODE
v.
HOWELLS.

(a) 7 T. R. 63.

(b) 5 Ad. & E. 350.

Exch. of Pleas, authority of the cases cited, it would for the subsequent
1838. years.

GOODE
v.
HOWELL.

LORD ABINGER, C. B.—The learned Judge having reported that this was a perverse verdict, there must be a new trial, unless this was a good notice for Michaelmas; and, notwithstanding the ability and industry which Mr. *Evans* has displayed in support of it, I am still of opinion that it is a bad notice. I consider it as being now settled law, that a notice to quit tithes is on the same footing as a notice to quit lands: that is a principle which, in my experience, has been always recognised and acted on at Nisi Prius. Then, would a notice in these terms be sufficient in the case of a tenant of lands? I think not. If it had said that he meant to determine the composition as soon as by law he might, I agree that that might have been sufficient, and that it might not be necessary to state the precise time, or to use any particular form of words; but it says no such thing. Here part of the tithes became due in May—that is, between March and Michaelmas: the notice, therefore, in its terms would operate on them. The term “from henceforth,” means “from time to time from this day.” It is the same as a notice to quit by a tenant of lands, without indicating any time. I think, therefore, the notice is clearly bad.

PARKE, B.—I am of the same opinion. The verdict having been, according to the report of the learned Judge, improperly given, and manifestly and materially wrong, the rule must be absolute, unless Mr. *Evans* is right on the other point: but I think he is wrong. It is now to be taken as established law, that a composition for tithes from year to year must be determined by a notice analogous to a notice to quit lands; that is, a six months' notice, terminating at the end of the year of composition. It is admitted that notice given in March, to determine the

tenancy of lands on any day but the expiration of it would be bad ; and so also a notice to quit without saying when: but it is said there is a difference between tithes and land in this respect. That may be so, where it appears on the face of the notice, or from the nature of the tithes, that it is not to operate until six months afterwards. Thus, in *Leech v. Bailey*, the tithes being all due at the very period when the notice was given, would not be again payable until the same period in the following year ; so that in effect the notice could not operate for a year. That notice amounted to this—" After the year for which we are now agreeing, I will set out the tithes;" and the ground on which the judgment of the Lord Chief Baron proceeds is, that from the nature of the tithes it could not operate for more than six months. That case, therefore, is no authority in favour of the defendant. Here the notice is given in March, and would apply to the tithes set out in May: therefore neither on the face of it, nor from the nature of the tithes, would it appear to be a notice for six months. If an immediate notice were given in March to quit lands held from Michaelmas, it would clearly be bad, and would not operate at all: so here, the notice being intended to operate immediately, and not being capable of doing so, cannot in law have any operation at all.

Exch. of Pleas,
1838.

GOODE
v.
HOWELLS.

BOLLAND, B.—I am of the same opinion, that this notice was inoperative. It is distinctly laid down in the case of *Bishop v. Chichester* (a), that there must be the same notice to determine a composition for tithes as between landlord and tenant.

Rule absolute.

Chilton and *E. V. Williams* appeared in support of the rule.

(a) 2 Bro. Ch. C. 161.

Exch. of Pleas,
1838.

HUGHES, Esq., *v.* REES.

The plaintiff declared against the proprietor of a newspaper for libels contained in successive numbers of the paper, referring to the same subject-matter, and to each other. The declaration stated in the commencement, the occasion on which the first libel was published, and set it out: it then proceeded: "And the defendant, afterwards, to wit, on &c., further contriving and intending as aforesaid, in a certain other number of the said newspaper called &c., published of and concerning the plaintiff &c. a certain other false &c. libel, that is to say," (setting it out). Two other subsequent libellous paragraphs were afterwards introduced and set out in the same manner:—*Held*, that each of these statements was a separate count.

One of the paragraphs was as follows:—"We again assert the cases formerly put by us on record; we assert them against A. S. and A. H. (the plaintiff). We again assert they are such as no gentleman or honest man would resort to:"—*Held*, that these words imported a charge of misconduct against the plaintiff, not merely an assertion in contradiction of him, and therefore were actionable without the aid of any extrinsic averment.

LIBEL.—The first count of the declaration stated, that certain places called the Carnarvonshire boroughs returned and were entitled to return a member to serve in Parliament for the borough of Carnarvon, pursuant to a certain act of Parliament, &c.; and that there had been an election for a member to serve in Parliament for the said borough, on the 25th of July, 1837, when the plaintiff and one Charles Paget were opposing candidates, and the plaintiff was returned, and was and is the member for the said borough; yet the defendant, contriving, &c., heretofore, to wit, on the 23rd day of September, 1837, in a certain number of a certain newspaper publication called "The Carnarvon and Denbigh Herald, and North and South Wales Independent," falsely &c., did publish and caused to be published, a false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning the said boroughs, and of and concerning the election of a member for the same, that is to say. [The count then set out a paragraph imputing to the plaintiff and a Mr. Smith acts of coercion of voters, which it alleged to be "derogatory to their character as gentlemen, and subversive of every principle of manhood."] The declaration then proceeded as follows:—And the defendant afterwards, to wit, on the 30th day of September, 1837, further intending and contriving as aforesaid, in a certain other number of the said newspaper publication, called &c., published of and concerning the plaintiff, and of and concerning the plaintiff as member as aforesaid, a certain other false, scandalous, and malicious libel, &c., that is to

Arch. of Pleas,
1838.

HUGHES
v.
REES.

say [setting out a paragraph repeating the imputations contained in the former.] And the defendant afterwards, to wit, on the 21st day of October, 1837, further contriving and intending as aforesaid, and to cause it to be suspected and believed that the plaintiff had been guilty of some bad and improper conduct, in a certain other number of the said newspaper publication, called &c., falsely and maliciously did publish, &c., of and concerning the said plaintiff, a certain other false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, that is to say:—"We again assert the cases formerly put by us on record. We assert them against Assheton Smith and Achilles Hughes (meaning the said plaintiff.) We again assert they are such as no gentleman or honest man would resort to." And the defendant afterwards, to wit, on the 4th day of November, 1837, further contriving and intending as aforesaid, in a certain other number of the said newspaper publication, called &c., falsely and maliciously published, &c., concerning the plaintiff, and concerning the said election, a false, &c., libel, in a certain part of which is contained the scandalous &c., matter following, that is to say: [setting out the paragraph, which referred to and reiterated the charges contained in the first two.] By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his good name, fame, and credit, &c.

Plea, not guilty; upon which issue was joined.

At the trial before *Gurney*, B., at the last Shropshire Assizes, the jury found a general verdict for the plaintiff.

In Easter Term, *Whateley* obtained a rule nisi for arresting the judgment, contending that the third count did not contain any actionable matter, for that the natural construction of the words therein complained of was, that the defendant asserted the cases before stated by him in op-

Exch. of Pleas,
1838.

HUGHES

v.
REES.

position to the counter assertion of the plaintiff and Mr. Smith. In this term,

Maule, Talfourd, Serjt., and R. V. Richards, shewed cause.—In the first place, it may be doubted whether that which is called the third count is, in fact, a separate and distinct count: the declaration appears to be so drawn as to contain one count only. The “further contriving and intending,” and the different date, being under a videlicet, do not, without any new heading or inducement, make this a new count. The allegation is incorporated with what goes before and after. The plaintiff complains of several different libellous publications, which he may do in one count, as much as if they were all contained in the same number of the newspaper. The declaration states a series of conduct on the defendant’s part—one libellous statement pervading a number of newspapers; not matters unconnected with and independent of each other, but a continuation of charges, referring to and dependent on each other. The injury is by the united operation of all these acts, which bear upon each other. Therefore, even on the assumption that the particular paragraph in question is not libellous, the declaration is still good; since upon this record, framed as it is, it does not necessarily appear that the jury must have found damages for matter which is not actionable. [Lord Abinger, C. B.—You may put into one count for libel or slander, all words spoken or written at one time; but I am not aware that you may put into one count, matters published at different times. There may be an inducement common to all the counts. Here each particular count presents a different story.]

But, secondly, this part of the declaration does charge matter which is libellous, being construed according to common sense and the ordinary meaning of the words. The doctrine that doubtful words are to be construed in mitiori sensu, has long been exploded. The obvious

meaning of this paragraph is, "we again assert the matters alleged in former numbers of our paper against Assheton Smith and Hughes," which matters are described in former parts of the declaration, and are admitted to be libellous. It means simply that the writer adheres to his former libellous imputations. If the paragraph is to be understood *controversially*, as is contended on the other side, it is elliptical—it must be read, "we assert them against the assertion of Assheton Smith and Achilles Hughes." The direct and immediate sense of the word "against" is an accusatory sense; the other is a transitive and secondary sense. [*Alderson*, B.—That is so, when you speak of an *act* of violence; but an *assertion* against a man is a contradiction of him.] It is submitted that it rather means an assertion criminatory of him. [*Alderson*, B.—All that is said here may be true, and yet the cases spoken of may all apply to a third person—and every word may have its natural meaning:—"We re-assert that the cases formerly stated by us are true; we assert them notwithstanding the contradiction of Smith and Hughes; and we assert that they are such as no gentleman or honest man would resort to."] Even if the words are ambiguous, and capable of a double interpretation, that is not a sufficient ground to arrest the judgment after verdict; the Court will presume that the jury have found the malicious meaning of which they are capable; *Tomlinson v. Brittlebank* (a). The question is not whether another meaning can be put upon them, but whether the jury might not find them to have a libellous sense. [*Lord Abinger*, C.B.—If, according to their *natural import*, the words are libellous—although they might be explained away—the verdict of the jury is conclusive, but not otherwise. Where they are ambiguous in themselves, the verdict of the jury will not help them.] The question is merely

Exch. of Pleas,
1838.

HUGHES
v.
REED.

(a) 4 B. & Ad. 630; 1 Nev. & M. 455.

Exch. of Pleas,
1838.

HUGHES
v.
REES.

whether the words are reasonably capable of a libellous meaning: *Harvey v. French* (a), *Woolnoth v. Meadows* (b), *Adams v. Meredew* (c). [Lord Abinger, C. B.—The whole of your argument is in truth this—that “assert against” means “charge.”]

Whateley and Busby, contra.—First, this is a separate count. It appears on the statement in the count itself, that it applies to a different day and a different transaction. The precedents are all in this form; see 2 Chit. Pl. 427, where 2 Lev. 193, and 3 Lev. 358, are cited to shew, that if the second count commence “And whereas also,” &c., it will be sufficient. This count must be read with reference to the introductory facts set forth in the first count, but without reference to the libels contained in the previous counts. It must otherwise be contended that there ought to be a special introduction to each count.

Secondly.—It makes no difference in this case that the question arises after verdict. If the words be equivocal in themselves, the plaintiff is bound to shew, by extrinsic statement, what was the sense in which they were used, and that they *do* import a libel: *Hawkes v. Hawkey* (d). It is the same as if there had been a general demurrer to the declaration: the plaintiff must shew that in the reasonable and natural construction of the words they impute misconduct to him. Now, the natural sense of these words does not import any charge against, but only a contradiction of, the plaintiff. Suppose that, his agents having been accused of acts of intimidation, and the cases being published, the plaintiff asserted that they were all false: then the defendant re-asserts them notwithstanding. That is all which these words necessarily import. In *Tomlinson*

(a) 1 C. & M. 11.
(b) 5 East, 463.

(c) 3 Y. & J. 219.
(d) 8 East, 427.

v. Brittlebank, the natural sense of the word "robbed," unexplained by other matter, imputed an indictable offence. In *Harvey v. French*, there was a clear imputation of the offence of sending a threatening letter. *Kelly v. Partington* (a) was a very similar case to the present. There the declaration stated that the defendant, intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her as such, the following words:—"She secreted 1s. 6d. under the till, *stating*, these are not times to be robbed:" and these words were held not to be defamatory in their nature, and not actionable although followed by special damage. In *Sweetapple v. Jesse* (b), *Littledale, J.*, says:—"After verdict for the plaintiff, the Court must presume such matters as it was necessary for the plaintiff to prove, *in order to support the allegations in his declaration.*" *Parke, J.*, states the rule in similar terms; and adds: "If the declaration had alleged an intention to impute by the words, that the plaintiff had been guilty of wilfully setting fire to his premises, under circumstances which would have made it a crime, then, after verdict, it must have been presumed that the words were proved to have been used in that sense." So here, the plaintiff might have so framed his count by the introduction of prefatory matter, as that the verdict might have been made conclusive.

Esch. of Pleas,
1838.

HUGHES
v.
REES.

Cur. adv. vult.

The judgment of the Court was delivered on a later day by—

LORD ABINGER, C. B.—This was the case of a declaration in libel, complaining of several paragraphs in successive numbers of a newspaper, and a motion was made to

(a) 5 B. & Adol. 645; 3 Nev. & M. 117.

(b) 5 B. & Adol. 27; 2 Nev. & M. 36.

Exch. of Pleas,
1838.

HUGHES
v.
REES.

arrest the judgment, on the ground that one of them, which consisted of the following words—"We again assert the cases formerly put by us on record; we assert them against A. S. and A. H. (the plaintiff); we assert, that they are such as no gentleman and no honest man would resort to,"—contained nothing amounting in law to a libel. The first answer given by the plaintiff's counsel to this application was, that the part of the declaration on which these words were set forth, was not to be considered as a separate count; but that all the allegations in the declaration, although charging different libellous publications in different numbers of the newspaper, amounted only to one count in all. We are, however, of a contrary opinion, and entertain no doubt that this declaration contains several counts, and that this is a separate and distinct one from the two which preceded it. The second question which has been raised in the case is much more important; namely, what is the legal effect of these words, when considered after verdict? It certainly appears most natural to conclude, that the jury, who have given damages on this count, must have understood it as conveying some injurious charge against the plaintiff. If the word "against," in this sentence, were to be read as being used merely *in denial* of the correctness of some assertion made by the plaintiff, the words certainly would not be libellous; and that is undoubtedly a sense of which it is susceptible: but if the words were meant to signify "we assert *in accusation of*" the plaintiff, &c. then they would be libellous. It should seem that the latter is the sense in which the jury understood them, and although we entertained some doubt upon the argument, on consideration, we think it is the more natural construction. The rule must therefore be discharged.

Rule discharged.

Exch. of Pleas,
1838.

STEWART and Others v. ABERDEIN.

THIS was an action on a policy of insurance, effected on the Vrow Elizabeth, at and from Liverpool to Narva, and from thence to Dantzic, by Messrs. Douglas, Anderson, & Co., of London, as agents of the plaintiffs, Messrs. Stewart, Bald, & Co., merchants of Liverpool.

The defendant pleaded, 1st, as to the sum of 97*l.* 11*s.* 8*d.*, parcel of the sum of 100*l.* in the first count of the declaration mentioned, that after the cause of action in the said first count mentioned, with respect to that sum, had accrued, and before the commencement of this suit, to wit

In an action on a policy of insurance on ship, effected by D. & Co., brokers in London, as agents for the plaintiffs, who were merchants in Liverpool, the defendant pleaded, that after the loss had accrued, D. & Co., by and with the authority and assent of the plaintiffs, settled

and adjusted with the defendant the amount of the loss, according to the usage and custom of merchants in that behalf, at 97*l.* per cent., of which the plaintiffs had notice, and assented to and acquiesced in the said adjustment; that D. and Co., at the time of the payment and satisfaction of the loss as after mentioned, were indebted to the defendant in an amount exceeding the said sum of 97*l.*; and thereupon the defendant, by and with the privity, knowledge, and consent of the plaintiffs, paid and satisfied the said sum of 97*l.*, by giving credit to D. & Co. for that amount in their account with him; and the defendant then wholly discharged D. & Co. from all claims in respect of that sum in his said account with them; which payment and satisfaction D. & Co. had full authority from the plaintiffs to accept from the defendant on their behalf, as and for payment and satisfaction by the defendant; and the plaintiffs then accepted such settlement and payment in full satisfaction and discharge of the cause of action as to the said sum of 97*l.*

It appeared in evidence that the plaintiffs had for several years effected insurances in London through D. and Co., and had had general and insurance accounts current with them. The policy in question was effected in September 1835; the loss appeared on Lloyd's books in May 1836. D. and Co. were then indebted to the defendant to the amount of 217*l.* on their underwriting account of the previous year. In June 1836, they agreed this account with the defendant, and paid him 100*l.*, leaving the remainder on the account to meet the loss in question. In September, it was adjusted by the defendant and all the other underwriters, except two, at 97*l.* per cent. A memorandum was written on the policy, stating the loss to be payable in one month, and the defendant's subscription was struck through; and the loss was then passed into the accounts between D. & Co. and the defendant. In November, the loss being then about to be adjusted by the other two underwriters, D. & Co. advised the plaintiffs thereof, and the plaintiffs drew bills on them for the amount of the loss. On the 19th November, D. & Co. inclosed them a credit note of the settlement of the whole loss, and carried the amount of it to the credit of their insurance account with the plaintiffs, of which they sent them an extract; and they debited the plaintiffs with premiums to the end of September, leaving a balance due to the plaintiffs, which they transferred to the credit of the general account. At the foot of the credit note was written, "Above is the credit note of the loss per Vrow Elizabeth, 1155*l.* 3*s.* 10*d.*, but without our prejudice until in cash from the underwriters." The usage at Lloyd's was proved by several insurance brokers to be to settle losses, as between the broker and the underwriter, in the manner above stated, and some of them stated that the usage was well known in Liverpool:—*Held*, that there was sufficient evidence of a custom between the brokers and underwriters to make settlements in accounts by taking credits as payments, and of such a settlement having been made in the present case, and also of the plaintiffs having authorized the brokers to make such settlement, as in substance to prove the plea, and to discharge the underwriters.

Held, also, that the memorandum at the foot of the credit note did not necessarily import that the brokers were to receive payment in cash from the underwriters.

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

on the 20th of September, 1836, the said persons using the name, style, or firm of Douglas, Anderson, & Co., the said agents for the plaintiffs in the said first count mentioned, by and with the authority and assent of the plaintiffs, settled and adjusted with the defendant the amount of the loss on the policy of insurance in the said first count mentioned, and thereupon the amount of such loss was then settled and adjusted, *according to the usage and custom of merchants in that behalf*, at a certain sum, to wit, the sum of 97*l.* 11*s.* 8*d.*, in respect of the said sum of 100*l.* so underwritten by the defendant, on the said policy in the said first count mentioned, of which the plaintiffs then had notice, and then assented to and acquiesced in the said adjustment. And the defendant further says, that the said Messrs. Douglas, Anderson, & Co., before and at the time of the payment and satisfaction of the said loss so adjusted by the defendant, as hereinafter mentioned, were indebted to the defendant in divers large sums of money, exceeding in the whole the said sum of 97*l.* 11*s.* 8*d.*, parcel &c. And thereupon, and before the commencement of this suit, to wit, on the day and year last aforesaid, the defendant, *by and with the privity, knowledge, and consent of the plaintiffs*, paid and satisfied the said sum of 97*l.* 11*s.* 8*d.* parcel &c., *by giving credit to the said Messrs. Douglas, Anderson, & Co., for the said sum of 97*l.* 11*s.* 8*d.*, in their said account with the defendant*; and the defendant then wholly discharged the last-mentioned persons from all claims in respect of such last-mentioned sum of money, in this said account with them; *and which said payment and satisfaction the said last-mentioned persons had full authority from the plaintiffs to accept and receive from the defendant on their behalf, as and for payment and satisfaction by the defendant of the said sum of 97*l.* 11*s.* 8*d.* parcel &c.*; and the plaintiffs then accepted such settlement and payment by the defendant as aforesaid, in full satisfaction and discharge of the said

cause of action, as to the said sum of 97*l.* 11*s.* 8*d.*, parcel &c. And as to the residue of the said sum of 100*l.* in the first count mentioned, the defendant says, that no loss was sustained in respect of the subject-matter of insurance in the said policy in the said first count mentioned, beyond the said sum of 97*l.* 11*s.* 8*d.*, parcel &c., so paid and satisfied as aforesaid. And this the defendant is ready to verify, &c.

Exch. of Pleas,
1888.

STEWART
v.
ABERDEIN.

Second plea, as to the said sum of 97*l.* 11*s.* 8*d.*, parcel &c., that long before the said policy of insurance in the first count mentioned and effected, and from thence until and at the time of the adjustment and payment hereinafter mentioned of the said loss in the said first count mentioned, the said Messrs. Douglas, Anderson, & Co., the said agents of the plaintiffs in the first count mentioned, exercised and carried on the trade and business of insurance brokers in the city of London, and the defendant exercised and carried on the trade and business of an underwriter in the said city of London; and during all the time aforesaid, accounts had existed, and at the time of the loss, and of the adjustment and payment of the loss on the said policy, did exist between the said Messrs. Douglas, Anderson, & Co., as such insurance brokers as aforesaid, and the said defendant as such underwriter as aforesaid; and in which accounts the said Messrs. Douglas, Anderson, & Co., had credit for losses, returns of premiums, and claims on policies underwritten by the defendant, and the defendant had credit for premiums of insurance on policies of insurance underwritten by him, and effected by the said Messrs. Douglas, Anderson, & Co., as such insurance brokers as aforesaid; and at the time when the loss on the said policy became known as hereinafter mentioned, the said Messrs. Douglas, Anderson & Co., were indebted on the said account to the defendant in divers large sums of money, exceeding in the whole the said sum of 97*l.* 11*s.* 8*d.*, parcel &c.; and the defendant further says, that accord-

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

ing to the usage and custom used and approved of amongst merchants, insurance brokers, and underwriters, in the city of London, when any loss or claim on a policy of insurance is adjusted and settled between an insurance broker and underwriter of such policy, and between whom such accounts as aforesaid exist, unless the assured shall otherwise direct, the premiums for which the underwriter has credit in such account at the time when such loss is made known, are set off against the amount of such loss or claim on the policy, and the insurance broker is allowed in such account to the amount of such loss or claim; and if, at the time of the loss being made known as aforesaid, the amount of premiums for which the underwriter had credit exceeds the amount of such loss or claim, then such set-off is deemed and considered as payment and satisfaction by the underwriter of such loss or claim, and the insurance broker holds himself accountable to the assured for the payment to him of such loss or claim: of which said usage and custom the plaintiffs, before and at the time of effecting the said policy, and of the adjustment and payment hereinafter mentioned of the said loss on the said policy, had notice, and assented thereto; and the defendant further says, that the said loss on the said policy became first known to the defendant, to wit, on the 1st day of May, 1836; and that after the said cause of action, with respect to the said sum of 97*l.* 11*s.* 8*d.*, parcel &c., had accrued, and before the commencement of this suit, to wit, on the 20th day of September, 1836, the said Messrs. Douglas, Anderson, & Co., as the agents of the plaintiffs, and with their knowledge and assent, adjusted and settled with the defendant the amount of the said loss on the said policy of insurance, and the amount of such loss was then settled and adjusted according to the usage and custom of merchants in that behalf, at a certain sum, to wit, the said sum of 97*l.* 11*s.* 8*d.*, in respect of the said sum of 100*l.* so underwritten by the defendant on the said policy, of

which the plaintiffs then had notice, and fully assented and acquiesced in the said adjustment; that the defendant, according to the said usage and custom hereinbefore mentioned, afterwards, to wit, on the day and year last aforesaid, gave credit to the said Messrs. Douglas, Anderson, & Co., in their account with him, for the said sum of 97*l.* 11*s.* 8*d.*, by setting off premiums to that amount for which the defendant had credit in such account at the time the said loss became known as aforesaid, against such loss as aforesaid; and the said Messrs. Douglas, Anderson, & Co., then had credit to the extent of the said loss so adjusted as aforesaid in their said account with the defendant, and then held themselves accountable to the plaintiffs for the payment to them of the said sum of 97*l.* 11*s.* 8*d.*; of all which premises the plaintiff afterwards, to wit, on the day and year last aforesaid, had notice, and fully assented and acquiesced therein, and then gave up and relinquished all claim against the defendant in respect of the said sum of 97*l.* 11*s.* 8*d.*, parcel &c., and accepted the said Messrs. Douglas, Anderson, & Co., as their debtors as to the said sum of 97*l.* 11*s.* 8*d.*, parcel &c., in lieu of the defendant, and the said defendant was thereby induced to give fresh credit to the said Messrs. Douglas, Anderson, & Co., for other premiums in his said account with them; by reason of which said several premises, the said cause of action, and all claim by the plaintiffs against the defendant, as to the said sum of 97*l.* 11*s.* 8*d.*, parcel &c., became and was wholly extinguished and discharged and satisfied. And as to the residue of the said sum of 100*l.* in the first count mentioned, the defendant says, that the loss in the said first count mentioned did not exceed the rate of 97*l.* 11*s.* 8*d.* on the said sum of 100*l.* so insured by the plaintiffs as in the said first count mentioned: and this the defendant is ready to verify, &c.

The declaration contained also the usual common counts, to which the defendant pleaded non assumpsit.

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

Replication to the first plea, that the said plea, and the statements therein contained, are not true in substance and fact; concluding to the country. There was the like replication to the second plea, and issues were joined on both.

At the trial before Lord *Abinger*, C. B., at the sittings at Guildhall after Michaelmas Term, 1837, the facts appeared to be in substance as follows:—

The policy in question was effected on the 26th September, 1835, and the defendant was an underwriter upon it for 100*l*.

The loss appeared upon Lloyd's books in May 1836. At the time of the loss thus appearing, Douglas, Anderson, and Co. were indebted to the defendant in a balance of 217*l*. 3*s*. 8*d*., on their underwriting account of the previous year, up to March 1836; and in the month of June, 1836, their clerk agreed this account with the defendant's clerk, and paid him the sum of 100*l*., leaving 117*l*. 3*s*. 8*d*. on the account, which was retained to meet the loss on the *Vrow Elizabeth*.

The documents to establish the loss were not brought forward until the month of September 1836, and on the 20th of that month it was adjusted by the defendant and all the other underwriters, except two, at 97*l*. 11*s*. 8*d*. per cent.

A memorandum was written on the policy, stating the loss to be payable at one month, and the defendant's subscription was struck through, and the loss was then passed into the accounts between Douglas, Anderson, and Co. and the defendants, in their respective books, but the accounts were not formally agreed between them.

The plaintiffs had for several years employed Douglas, Anderson, & Co. as their brokers for effecting insurances in London, and the latter had a general account current, as well as an insurance account, with the plaintiffs; each being kept quite distinct, and the balance of the insurance

account being at certain periods carried into the general account as cash. *Each. of Pleas, 1838.*

The further information required by the two underwriters, who had not adjusted the loss in September, was laid before them in the early part of November, and Douglas, Anderson, & Co. having advised the plaintiffs of the loss being about to be settled by them, the plaintiffs drew two bills for 600*l.* each, on the 16th and 17th November, and on the 19th of November, Douglas, Anderson, & Co. enclosed them a credit note or account of the settlement of the whole loss, the amount of which (1155*l.* 3*s.* 10*d.*) they, Douglas, Anderson, & Co., carried to the credit of the insurance account, of which they sent an extract, and they debited the plaintiffs with premiums to the end of September, leaving a balance of 886*l.* 12*s.* 7*d.* due 21st February in the plaintiffs' favour, which they transferred to the credit of the general account.

STEWART
v.
ABERDEIN.

At the bottom of the credit note was written, "Above is the credit note of the loss per Vrow Elizabeth, 1155*l.* 3*s.* 10*d.*, but without our prejudice until in cash from the underwriters."

On the 21st November, 1836, the plaintiffs acknowledged the receipt of these accounts, and stated that they would be examined.

On the 26th November, Douglas, Anderson, & Co. stopped payment, and as soon as the plaintiffs were aware of this circumstance, one of them came up to London, and demanded payment of the underwriters, and amongst others of the defendant; which being refused, the present action was brought.

At the trial several insurance brokers were called, who stated the usage at Lloyd's, as to settlements between underwriters and the brokers, to be as above detailed, and it was also stated by some of them to be well known at Liverpool as well as in London. For the plaintiffs it was contended, on the authority of the cases of *Russell*

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

v. Bangley (a) and Scott v. Irving (b), that the set-off between the brokers and the underwriter was not binding on the plaintiffs, who were not expressly shewn to have any knowledge of the usage; and also that the memorandum at the foot of the credit note shewed that the brokers did not treat the settlement as being conclusive as a payment to them from the underwriters.

The Lord Chief Baron, in summing up, expressed his opinion that the notion had been pushed too far about the actual payment in cash, and that it appeared to him that if one man has to pay another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal whether there is an interchange of bank notes, or a mere transfer of accounts from one side to the other, and that it is equally a payment, if it is done without fraud. He however left the whole facts to the jury, and directed them to consider whether parties effecting insurance for their own benefit through an agent, must not know what is the habit of dealing between the broker and underwriter; and whether the authority to settle must not mean that the broker should settle in the same way as is the custom to settle with underwriters. That in such case he considered the broker to be liable to his principal after such settlement, and that the plea was proved; but if it was only expected that the payment should be a payment in cash, then the plaintiffs were entitled to a verdict. With respect to the memorandum at the foot of the credit note, his Lordship thought that all which it imported was this—that inasmuch as the account had not yet been adjusted by all the underwriters, the brokers, allowing the assured to draw for the whole amount of the loss in the meantime, did so without prejudice to their rights in case the others should not pay or settle in account with them. He how-

(a) 4 B. & Ald. 395.

(b) 1 B. & Adol. 605.

ever left it to the jury to say whether the interpretation put upon it by the plaintiffs' counsel was the correct one. The jury found a verdict for the defendant.

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

In Hilary Term, *Cresswell* obtained a rule nisi for a new trial, on the ground that the Lord Chief Baron had misdirected the jury,—first, in stating to them his opinion that the settlement, under the circumstances proved, amounted to payment to the plaintiffs, there being no sufficient evidence to shew that they were cognisant of the usage; and, secondly, as to the effect of the memorandum.

Maule shewed cause in Easter term.—The direction to the jury was fully warranted by the evidence. The present case might be decided on considerations arising out of the nature and particular circumstances of it, without reference to the former decisions on this subject: it is necessary, however, to refer to them in order to shew that they are not conclusive authorities against the defendant in this case. In *Todd v. Reid* (a), (which is very shortly reported, and was decided on motion for a new trial, without argument), it was undoubtedly stated by the Court that the usage at Lloyd's, to set off the general balance due from the broker to the underwriter, in the settlement of a particular loss, could not be supported in law, and that the broker was only entitled, as agent of the assured, to receive payment in cash. The Court disposed of the case by saying, "This is in fact an attempt to pay the debt of one person with the money of another." It is difficult to see how such a conclusion could be applied to such a case. An insurance broker owes money to the underwriter, and the underwriter to the assured:—is there any thing unlawful in an agreement amongst them that the assured shall receive his money from the broker,

(a) 4 B. & Ald. 210.

Exch. of Pleas,
1888.

STEWART
v.
ABERDEIN.

and take him for his debtor, and that the debt of the broker to the underwriter, and of the latter to the assured, shall both be discharged? It is not like the case where a *servant* is specifically employed to fetch money for his master in specie—this is the case of the employment of an agent, whose creditor, by the very nature of the business in which he is employed, the assured is to become. The strict rule laid down in *Todd v. Reid* is no more applicable to the case of an insurance broker than to that of a banker. When once the broker makes himself conclusively *the debtor of the assured*, whether by receipt in cash from the underwriters, or by settlement with them in account, that is all the assured has to require. [Lord Abinger, C.B.—Suppose two merchants have a running account, and one of them desires to increase his credit, and authorizes the other to receive money for him; does not that mean, to carry it to the account—unless the party specifically directs the contrary? Is it not a question of fact, what the principal means the agent to do?] Unquestionably; and here it is clear what it is which the principal means the broker to do—namely, to settle the account so as to make himself, according to the established and understood usage, the debtor of his principal. *Todd v. Reid*, however, is distinguishable on the ground that there it does not appear that there was any evidence to shew that the plaintiff was cognisant of the usage. In *Russell v. Baugley (a)*, the main ground on which it was held that the underwriter was not discharged, was that his name had never been struck off the policy: and *Abbott, C. J.*, while he states the general rule of law to be, that “if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged; but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not dis-

(a) 4 B. & Ald. 395.

charged ;” admits that “ in cases of insurance, usage may possibly introduce a different rule.” Here the jury have found the existence of the usage, and the knowledge of it by the plaintiffs. The express ground of the decision in *Scott v. Irving* (a), was, that the assured was not shewn to be cognisant of the usage : and all the Court admit that there may be cases where an assured, being cognisant of such usage, may be supposed to have assented to it, and therefore be bound by it. *Bartlett v. Pentland* (b), again, proceeds expressly upon the assumption that the plaintiffs knew nothing of the usage, and that the defendant’s name had been struck off the policy without their assent. Lord *Tenterden* there says—“ Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with the usage, and to act upon it: but there is nothing in the case to raise such a presumption against the present plaintiffs; on the contrary, there is every thing to rebut such a presumption.” May not merchants in Liverpool also, in these times of constant and rapid communication with the metropolis, be taken to know the usage of the place where they have been in the habit of effecting insurances? There are many usages which merchants trading in London are presumed to be cognisant of, and which the slightest evidence is supposed to bring home to them. [Lord *Abinger*, C. B.—For instance, the usage of bankers to shut their shops at five o’clock, after which hour the presentment of a bill there is bad.] So also, the usage of setting-off one-third new for old. It is clear that in the present case, the plaintiffs had no objection to treat Douglas, Anderson, & Co. as their debtors, instead of the underwriters. It is already recognised in the Courts, that the broker is the debtor of the underwriter for the premiums, and that this becomes a debt due from the assured to the broker, before actual payment

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

(a) 1 B. & Adol. 605.

(b) 10 B. & Cr. 760.

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

by him to the underwriter. The assured gets credit with the broker for the premiums, by reason of *his* credit with the underwriter, and the underwriter gives credit to the broker, because he is from time to time crediting him for losses. And this is a highly convenient mode of conducting the business: it is much better for the assured that he should at once have for his debtor the broker, whom he knows and trusts, than all the body of underwriters, who, or some of whom, may or may not pay. The usage is therefore a reasonable one; it was clearly proved; and there was abundant evidence to go to the jury that the plaintiffs knew of it. There was direct proof that it was well known at Liverpool; and the long accounts between the plaintiffs and Douglas, Anderson, & Co., the retainer of 117*l.* to meet this particular loss, and their drawing on the brokers for the amount of the settlement, shewed clearly that they had been accustomed to deal upon the terms of the usage, and that they acquiesced in it.

Secondly, there was no misdirection as to the terms of the memorandum of the 19th of November. Taking the usage to exist, and to have been known to the plaintiffs, the question is, whether the words “without our prejudice until in cash from the underwriters” do not mean merely “until the account is good”—that is, until the balance is in our favour. [*Alderson, B.*—Knowledge of the usage being traced, it means “until we have a balance to justify a payment.”] *Andrew v. Robinson* (a) is an authority to shew that as soon as the broker has received credit in account with the underwriter for a loss upon a policy, he is liable for the amount to his principal as money had and received; and that if the underwriter’s name have been erased from the policy, the broker cannot dispute the liability of the underwriter for the loss, nor his own receipt

(a) 3 Campb. 199.

of the sum subscribed. Besides, the meaning to be put upon the memorandum was left to the jury, although the learned Judge stated the construction which he should himself have put upon it.

Erech. of Pleas,
1838.

STEWART
v.
ABERDEIN.

Cresswell and Cowling, contra.—A clear right of action being vested in the plaintiffs, to recover from the defendant a certain sum of money, in respect of his subscription of the policy, the defendant alleges that he has satisfied it, and the burden of proof that he has done so lies on him. Now, he alleges by his plea, that Douglas, Anderson, & Co., by and with the authority and assent of the plaintiffs, settled and adjusted the loss with the defendant, and that it was thereupon settled and adjusted according to the usage and custom of merchants in their behalf, at 97*l.* 11*s.* 8*d.* per cent., of which the plaintiffs had notice, and assented to and acquiesced in such adjustment: that Douglas, Anderson, & Co., at the time of the payment of the loss so adjusted, were indebted to the defendant in monies exceeding the amount at which it was settled; and thereupon the defendant, by and with the privity, knowledge, and consent of the plaintiffs, paid and satisfied the loss by giving credit to Douglas, Anderson, & Co., for the amount in their account with him, and discharged them from all claim in respect of it; which payment and satisfaction they had full authority from the plaintiffs to accept from the defendant on their behalf, for payment and satisfaction of the amount of the loss. All this he is bound to prove. Now, there is no doubt the brokers had authority to settle and adjust the loss; neither has there been any repudiation by the plaintiffs of the adjustment at 97*l.* 11*s.* 8*d.*; but it is equally clear, that there was no authority to the brokers to settle it by credit in account with the defendant. The defendant could not pay a debt to the plaintiffs, by giving credit in account to Douglas, Anderson, & Co.: it is a contradiction in terms. But further,

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

the defendant sought to prove payment and satisfaction to the plaintiffs, merely by proof of the usage ; for there was no distinct proof of any actual adjustment or settlement with Douglas, Anderson & Co. The payment of the 100%. was no proof of the kind of settlement set up in the plea, but of a settlement by payment in cash, if any thing. The defendant undertakes to prove that the plaintiffs gave authority to the brokers to settle by allowance in account—that such settlement took place—and that the assured accepted it for payment and satisfaction of the loss. With respect to the alleged convenience of this usage, it may no doubt be very convenient to the broker and underwriter, but by no means to the assured ; he is thereby compelled to take the credit of the single insurance broker, rather than the united credit of all the underwriters : he is driven to have one large debtor for the whole amount. Here it was said, first, that the plea was substantially made out by proof of the existence of the usage at Lloyd's, and that the assured, dealing there, should be bound by that custom. *Todd v. Reid* is a direct authority against that position. [*Parke, B.*—With regard to that case, it certainly is incorrectly reported : I was counsel in the cause, and there was no proof at all of any settlement in account between the broker and the underwriter. I made a note accordingly in the margin of my copy of the report.] At all events, the case is an authority that the usage to settle in this manner cannot by itself be considered as having any operation at all as against the assured. Further, the assured are not bound by their *simple knowledge* of the usage, unless they *agree to be bound* by the operation of it. Then it is said there is evidence of such assent ; for that the plaintiffs drew on the broker for the amount of the settlement. In *Russell v. Bangley* that circumstance existed, but it was held to make no difference. *Andrew v. Robinson*, and *Wilkinson*

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

for more than thirty years. It is no part of the contract of insurance to receive payment in this manner, and the plaintiffs can therefore be affected only by direct notice; for they can only be taken to be cognisant of the usual incidents of the contract; *Pelly v. Royal Exchange Assurance Company* (a). The Lord Chief Baron was wrong, therefore, in leaving it to the jury as a question of mere general knowledge by the plaintiffs of the usage; he ought to have left it to them to say, whether they had specific knowledge of it, and had agreed to be bound by it. [*Parke, B.*—My difficulty is, to see when this constructive settlement took place.]

With respect to the memorandum at foot of the credit note, the natural interpretation of it would certainly be, that the broker was *not* taking upon himself any responsibility, and did not admit any previous receipt of money, or any settlement.

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD ABINGER, C. B.—This was an action on a policy of assurance on the Vrow Elizabeth. The defendant pleaded, first, that Douglas, Anderson, & Co. were the insurance brokers and agents of the plaintiffs; that after the loss had occurred, they were authorized by the plaintiffs to adjust and settle the loss, which they did, at the sum of 97*l.* 11*s.* 8*d.*; that Douglas, Anderson, & Co., as such brokers, were indebted to the defendant, at the time of such adjustment, in a larger sum of money than the amount so settled; and that by the authority and with the sanction of the plaintiffs, Douglas and Co. accepted a credit in account with the defendant as a satisfaction and payment of the said sum of 97*l.* 11*s.* 8*d.*, and made themselves liable

(a) 1 Burr. 341.

to the plaintiffs for the same, who discharged the defendants therefrom. *Exch. of Pleas, 1838.*

This is the substance of the plea, or all that need to be proved, to entitle the defendant to a verdict in regard to the 97*l.* 11*s.* 8*d.*

STEWART
v.
ABERDEIN.

There is a second plea, which, in addition to these material facts, sets forth a custom between the insurance broker and the underwriters in London, to make these settlements in account by way of payment and discharge, according to a certain usage set forth in the plea. It then alleges, that the plaintiffs had knowledge of that custom, and assented to it, and that the settlement was made accordingly.

The jury found a verdict for the defendant; upon which there was a rule to shew cause why there should not be a new trial, on the ground, first, that there was no evidence that the plaintiffs had any knowledge of the custom alleged, or had assented to it; and, secondly, that there had been a misdirection as to the interpretation of a letter of the plaintiffs to the defendant, containing what was called the credit note.

This case has been very fully and ably argued on both sides, and in the course of the argument a point has been discussed, which was not suggested on the original motion for a new trial, and which was not brought into controversy at the trial at all; namely, whether there was any evidence that the defendant ever did come to such a settlement in account with the insurance broker, as is by him in his pleading alleged.

The Court has taken the whole argument into full consideration, and has come to the conclusion, that there was evidence of the settlement in account; that there was no misdirection upon the letter, the meaning of which, as part of a mercantile correspondence, was left to the judgment of a jury of merchants, nor was it material to the issue; and finally, that even if the custom was not specifi-

Exch. of Pleas,
1838.

STEWART
v.
ABERDEIN.

cally proved as alleged, or if it was not proved that the plaintiffs had a precise knowledge of the custom as alleged, yet there was sufficient evidence of a custom between the brokers and underwriters, to make settlements in account by taking credits as payments, and also of the knowledge of the plaintiffs of such a custom, and of their authorizing the brokers to settle with the underwriters, and to give them, the plaintiffs, credit on account for the loss, and to permit them to draw on the brokers for the amount. There was, therefore, abundant evidence to prove the first plea, if not the second.

It must not be considered, that by this decision the Court means to overrule any case deciding that where a principal employs an agent to receive money, and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him. But the Court is of opinion, that where an insurance broker, or other mercantile agent, has been employed to receive money for another, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with monies actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority, of the principal.

The rule therefore must be discharged.

Rule discharged.

Exch. of Pleas,
1838.

DOE on the several demises of JOHN LITTLEWOOD and CHARLOTTE his Wife, and WILLIAM MUSSON and JULIA his Wife, *v.* ELIZABETH GREEN.

THIS was a special case for the opinion of this Court, stated under the 3 & 4 Will. 4, c. 42, s. 25.

A testator by his will devised his real estates to his nieces, E. G. and J. P., *equally between them, to take as joint tenants, and their several and respective heirs and assigns forever:—Held,* that they took estates as joint tenants for life, with several inheritances on the death of the survivor.

John Newham, of Whittington, near Chesterfield, in the county of Derby, gentleman, by his will of this date, executed and attested as by law was then required for the devise of lands of inheritance, after first directing that all such debts as he should justly owe at the time of his decease, funeral expenses, and the necessary charges and expenses of proving that his will, to be paid and satisfied by the executors thereafter named, out of his personal estate and effects, devised in the words following:—"I give and devise the mansion-house I now live in at Whittington aforesaid, with the respective outbuildings and appurtenances thereto belonging, and also all the land near and adjoining thereto at Whittington aforesaid, and now in my occupation, unto my brother, William Newham, for and during the term of his natural life; and from and immediately after his decease, I give and devise the same to my nephew, John, the son of my said brother William Newham, for and during the term of his natural life; and in case my said nephew John Newham should have any child or children at the time of his decease, then I give and devise the same to such child or children, his and their heirs for ever; but in default of having any child or children lawfully begotten, then I give and devise the same to my nieces, Elizabeth, the wife of John Green, junior, of Whittington aforesaid, wood valuer, and Jane, the wife of William Pearson, of Whittington aforesaid, farmer, *equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever.*" The testator died in or about the month of February, 1800, seised in fee of

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

the mansion-house, land, and premises devised, and without having in any manner revoked or altered his said will, which was proved at Lichfield on the 17th of April, 1800, by the executors therein named.

All the respective devisees named in the will were living at the testator's death, at which time the said William Newham, the first tenant for life, entered into possession of the said devised premises, and died many years ago, leaving his son, the said John Newham, him surviving, who, upon the death of the said William Newham, entered into and upon the said devised premises, and died without having been married, on the 10th of February, 1837. The said William Pearson died in October 1807. The said Jane, the wife of the said William Pearson, died previously, namely, in October 1806, and left four children by her husband, the said William Pearson, her surviving, namely, Charlotte, Julia, Harriet, and Arthur; the said Harriet and Arthur both died in their infancy, and without ever having been married, viz. Harriet died in May 1818, aged nineteen years, and Arthur died in Rangoon, in India, in July 1825, aged nineteen years and upwards. The said Charlotte Pearson afterwards intermarried with and is now the wife of the lessor of the plaintiff John Littlewood, and the said Julia afterwards intermarried with and is now the wife of the lessor of the plaintiff William Musson.

The lessors of the plaintiff, John Littlewood and Charlotte his wife, and the said William Musson and Julia his wife, claim, in right of the said Charlotte and Julia as surviving co-heiresses of the said Jane Pearson, to be entitled to one moiety of the said testator's said estate at Whittington, as tenants in common in fee, for they contend that the words in the testator's will, "equally between them," and "their several and respective heirs," created a tenancy in common in fee between Elizabeth Green and Jane Pearson, and that the intermediate words, "to take as joint tenants," ought either to be rejected as

being repugnant to and inconsistent with the testator's true intent and meaning, or to be construed as indicating the mode in which the testator intended the devisees to hold and enjoy their estates.

The devisee, Elizabeth Green, who is now the widow of the said John Green, and the defendant in this cause, contends that a joint tenancy in fee or for life was created by the above limitation, and that the words, "to take as joint tenants," ought not to be rejected, and that in no event can the estate or estates of the lessors of the plaintiff accrue in possession till after her death. The defendant Elizabeth Green has entered into legal possession and receipt of the rents of the entirety of the property in question, as being sole tenant by survivorship.

The lessors of the plaintiff, since the death of John Newham, the second tenant for life, and before bringing this ejectment, demanded of the said Elizabeth Green the possession of a moiety of the said estate, which was refused by her.

The questions for the opinion of the Court are,

What estate or estates Elizabeth Green and Jane Pearson took by the above devise, and what are the rights and interests of the lessors of the plaintiff? And whether this ejectment is maintainable.

The *Attorney-General*, for the lessors of the plaintiff.—Under the devise in this will to the testator's nieces, Elizabeth Green and Jane Pearson, "equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever," they took the estate as tenants in common in fee, notwithstanding the expression "to take as joint tenants:" for although these words, when contained in a deed, have been held to have a strict technical meaning, it is otherwise in a will, where the putting such a construction upon them would be repugnant to the intention of the testator. There can be no doubt that the

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

Each. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

limitation to "their several and respective heirs," had the effect of creating several inheritances; and the only question will be, whether the devisees took as tenants in common in fee in the first instance, or only estates for life as joint tenants, with several inheritances in fee on the death of the survivor; and it is submitted that they took a tenancy in common in fee in the first instance. The probability is, that in copying the draft of this will some words were omitted, and that the passage was intended to have been, to take as tenants in "common and not as joint tenants;" but it is admitted that the court must construe the words as they now stand. In construing a will, the use of technical language must bend to effect the general intention of the testator. Now here it never can be contended that the object of the testator was to create a joint tenancy in fee, so that the survivor and his heirs should take the whole. The testator, by using the words, "several and respective heirs," seems to refer to the nature of the estate which he intended the devisees to take, and plainly shews that he intended that each should take a moiety of the estate to them and their heirs. Any words of severance in a will are sufficient to create a tenancy in common: Sheppard's Touchstone, tit. Testament, p. 445. All the authorities are uniform, that the word "equally" in a will will create a tenancy in common. In *Lewen v. Cox* (a), the testator devised his lands "to his two sons equally and their heirs," and that was held to be a tenancy in common, although without the word "equally" it would have been otherwise; because that word shewed that the testator intended that there should be no inequality between them, which there would have been if a right of survivorship were held to exist. So in *Denn d. Gaskin v. Gaskin* (b), the word "equally" was held to create a tenancy in common. Lord Mansfield there says, "Whe-

(a) Cro. Eliz. 695.

(b) Cowper, 657.

ther this is a tenancy in common or a joint tenancy, there is no room for argument; 'equally' as well as 'equally to be divided,' implies a division, whereas if they were to take as joint tenants there would be no division."— In *Lashbrook v. Cock* (a), the testator gave to his two daughters, Jane and Mary, "all his right in B. and C. *between them*;" and the Master of the Rolls held that these last words constituted a tenancy in common. In *Torret v. Frampton* (b), the word "respectively" was held to have the same effect. There the testator devised his lands to his wife for her life, "remainder to A., B., and C., and their heirs *respectively* for ever," and it was held to create a tenancy in common. So the word "amongst" has been held sufficient for the same purpose: *Campbell v. Campbell* (c), where the devise was "to and amongst the children of A. and B.," and it was held to be a tenancy in common. In order to deal with the words "to take as joint tenants," there is no occasion to reject them, for it is plain that the testator did not use those words in a technical sense, as conferring a right of survivorship, but only with reference to the mode of enjoyment, viz. that they should hold the estate jointly, not to divide it. If those words had been contained in a deed, they might have had the effect of creating an estate in joint tenancy, but being in a will, the Court must look to the general intention of the testator, to be collected from all the words of it. There are many cases where the word "jointly," and even the word "survivor," has been disregarded by the courts, in order to give effect to the intention of the testator. In *Ettricke v. Ettricke* (d), where there was a devise of the profits of land, in trust for the testator's six younger children, to be distributed in *joint and equal proportions*, Sir Thomas Sewell, M. R., was of opinion "that they took a tenancy in common; and that the word *joint*

Esch. of Pleas,
1838.

Don
d.
LITTLEWOOD
v.
GREEN.

(a) 2 Meriv. 70.

(b) Styles, 434.

(c) 4 Brown's C. C. 15.

(d) Ambl. 656.

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

was not to be considered as giving a joint interest, but the same as if the testator had said, ‘to my children *all together.*’” So, in *Perkins v. Baynton* (a), where the testatrix by her will gave “to Stukely Baynton and William Baynton 1,500*l. jointly and between them,*” it was held, notwithstanding the word “jointly,” to be a tenancy in common. Lord *Thurlow* says, “The one word here is ‘jointly,’ the other ‘between them;’ they must be so put together as to effectuate the intent.” In *Marryat v. Townly* (b), the devise was to trustees, in trust, as soon as the testator’s three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies, and their heirs, *as joint tenants*, and to whom he gave and devised the same accordingly; and it was held that it was not a joint estate, but to be construed *like joint tenants* (c), and that the conveyance must be at twenty-one respectively, with cross remainders. In that case there were the technical words “as joint-tenants,” and it was argued that “joint-tenants,” being a proper known word in law, ought to be construed and a conveyance made accordingly, as far as the law would admit, i. e. jointly for their lives, with several inheritances. Lord *Hardwicke* says, “There is certainly some obscurity in the present case, arising from the inaccurate drawing of the will; the rather because the drawer has used some legal terms without meaning them in the legal sense. And the Court, not being able to give each word its strict legal sense, must therefore find out the construction, so as to answer the reasonable intent, which the testator must be supposed to have had, of providing for his daughters and their families.” That is an express authority for construing the word “joint-tenants” otherwise than in its legal and technical sense. In *Blisset v. Cranwell* (d), the word “survivor” was dis-

(a) 1 Brown’s C. C. 118.

(b) 1 Ves. sen. 102.

(c) Viz. with reference to the mode of enjoyment.

(d) 1 Salk. 226.

regarded, in order to give effect to the intention of the testator. There the devise was, "I give and devise to my two sons and their heirs, and the longer liver of them, equally to be divided between them and their heirs," and that also was held to create a tenancy in common. In the present case, after the word "joint-tenants," there is not only the term "heirs," but "their *several and respective* heirs." The cases of *Turkerman v. Jeoffrys* (a) and *Barker v. Giles* (b) will perhaps be cited on the other side, but they are clearly distinguishable. In *Turkerman v. Jeoffrys*, the testator devised his lands to his two nieces, Jane and Elizabeth, equally to be divided between them during their lives, and after the death of them two, then to the heirs of Jane. Jane died during the life of Elizabeth, and it was held that Jane and Elizabeth were joint tenants during life, with the fee to the heirs of Jane, but not during the life of Elizabeth. But the reason is given by *Holt, C. J.*, who says, "The reason why the words 'equally to be divided' in a will, make a tenancy in common, is because it is taken to be the intent of the devisor. And now, since these words do not necessarily imply a tenancy in common, and that the intent of the devisor seems to be otherwise; by the subsequent words it ought to be construed according to his intent, which seems to be that they should enjoy the lands whilst he lived, and after their decease, to the heirs of Jane; you hazard the devise if you make it a tenancy in common; for, as *Mr. Eyre* says, if Elizabeth had died first, what would become of that moiety? for a contingent remainder, that cannot take effect when the particular estate determines, is void. Suppose Elizabeth have died, leaving issue a son, living Jane, if that had been a tenancy in common, the son of Elizabeth should have, which is directly against the intention of the devisor." In *Barker v. Giles* the testator devised

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

(a) *Holt*, 370.

(b) 2 P. Wms. 280; 9 Mod. 157.

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

his lands to be sold for the payment of his debts and legacies, and the surplus of the money arising from the sale to be laid out in lands, and to be settled to the use of the testator's two nephews, Jerome and Robert Barker, and the survivors and survivor of them, and their heirs and assigns for ever, equally to be divided between them, share and share alike; and it was held that they were joint-tenants for their lives, with several inheritances. But there it was clearly the intention of the testator that the survivor should take the whole during his life. Neither of those cases, therefore, is a binding authority against the present plaintiff. The dictum of Lord *Hale*, in *King v. Melling* (a), may also be cited to shew that these words created an entire joint-tenancy. He there says, "a devise to two, equally to be divided between them and *to the survivor of them*, makes a joint-tenancy," but he goes on to add, "upon the express import of the last words." There is another case which shews, that when the term "survivor" is used, the parties take as tenants in common: *Doe d. Borwell v. Abey* (b). There the devise was to the three sisters of the testator, for and during their joint natural lives, and the natural life of the survivor, *to take as tenants in common, and not as joint-tenants*; remainder to trustees during the respective lives of the sisters, and *the life of the survivor*, to preserve contingent remainders, and after their respective deceases and the decease of the survivor, with remainders over: and it was held, that the sisters either took in joint-tenancy, to be regulated in its enjoyment as a tenancy in common: or as tenants in common, with benefit of survivorship. The Court, in the present case, will not attach much to the words "to take as joint-tenants," when it appears so clearly to be the intention of the testator, from using the words "their several and respective heirs," that the parties should take as tenants in common in fee.

(a) 1 Vent. 216.

(b) 1 M. & Selw. 428.

Kelly, for the defendant.—The last case cited has no application to the present, except to shew that the Courts will give effect to every word in a will, to effectuate the intention of the testator. What is contended for on the other side, is to satisfy the Court that the intention of the testator was to give a tenancy in common, and the effect of that would be to strike out the words “to take as joint tenants.” A great number of cases have been cited to shew that the law leans against joint-tenancies and in favour of tenancies in common, and that such an effect should be given to this devise, unless there be words clearly sufficient to control such an interpretation. It is quite agreed, that if the word “equally” had been used without the words “to take as joint tenants,” it would have created a tenancy in common, and the doctrine in the six cases first cited is not disputed, viz., that when the words in a will point to a severance of the estate, the devise will be construed as creating a tenancy in common, provided no words were used expressive of a contrary intention on the part of the testator: but here the words “to take as joint tenants” operate to rebut such an intention. *Ettricke v. Ettricke*, where the words were “in joint and equal proportions,” might have been classed with the other cases, if it had not been for the term “joint,” but that term had there no meaning when joined with the words “in equal proportions.” As to *Perkins v. Baynton*, it has been held in many cases that the words “between them” make a severance, and therefore they were repugnant to the word “joint.” The case of *Marryat v. Townly* is distinguishable from the present, because there the words “as joint-tenants” came at the very end of the clause, and could not be held to alter the meaning of all that had gone before, which had clearly given a tenancy in common, and it therefore became impossible to give effect to all the words, without attributing another meaning to the term “joint-tenants,” and construing them as tenants in common. But here the words “to take

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

as joint tenants” are in the middle of the sentence, and it is not at all necessary to reject them. It must also be observed, that that was not the case of a direct devise, but of a direction to trustees to convey, in which cases courts of equity exercise a greater latitude of construction than is allowed by the ordinary rules of law in the instance of a direct devise. And Lord *Hardwicke* says in that case (a), “It happens luckily to assist the Court, that the drawer of the will has inserted directions for the trustees to convey, and whenever there are such directions for the trustees, in whom the legal estate of the fee is vested, the Court has held it in his power to mould it so as best to answer the intention of the testator, and not so as to fulfil the words of the will; which has been always the rule in marriage articles: and if that was this case, there would be no doubt; but even on wills the Court has used the same latitude.” Besides, those cases were determined at a time when the rule of law was not so well settled as it is now, that effect must be given, if possible, to every word in a will, and particular words shall not be disregarded, if any effect can be given to them consistent with the general intent of the testator. That rule was clearly established by the judgments in *Doe d. Gallini v. Gallini* (b), and *Jesson v. Wright* (c). In the former case, Lord *Denman*, C. J., in delivering the judgment of the Court, says, “The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late; as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the operation of the rule in *Shelley’s* case; and it has since been laid down in others, where technical words of limitations have been used, and other words shewing the intention of the testator that

(a) 1 Ves. sen. 103.

(b) 5 B. & Adol. 621; 2 Nev. & Man. 619.

(c) 2 Bligh, 57.

the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the later cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord *Redesdale*, in *Jesson v. Wright* (a). In the present case, it is easy to give effect to the whole of the words of the will, by construing them as giving to the testator's two nieces an estate in joint-tenancy for their lives, with several inheritances in fee on the death of the survivor. If the will had stopped at the word "joint-tenants," there might have been a great difficulty in giving effect to the whole of the words in the will, because there would have been some inconsistency between those words and the words "equally between them," which import a tenancy in common. But the intention of the testator is made apparent by the position of the words "to take as joint-tenants" in this sentence, those words following the devise to his nieces Elizabeth and Jane, but preceding any mention of their heirs, thus restricting the joint-tenancy to the estate to be enjoyed by the immediate devisees during their lives, and not to extend to a joint-tenancy in fee. By adopting this construction, effect will be given to all the words of the will. In *King v. Melling* (b), the devise was to two, equally to be divided between them, and to the survivor of them; and there, notwithstanding the words "equally to be divided between them," it was held that a joint-tenancy was created, and those words were rejected, upon the express import of the last words, "and to the survivor of them." In the case of *Blisset v. Cranwell* (c),

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

(a) 2 Bligh, 57.

(b) 1 Vent. 216.

(c) 1 Salk. 226.

Exch. of Pleas,
1539.

DOE
d.
LITTLEWOOD
v.
GREEN.

the words "equally to be divided" came after the words "to my two sons, and their heirs, and the longer liver of them," and the last words being words of severance, creating a tenancy in common, it became necessary to reject the words "the longer liver of them." [*Alderson, B.*—There the words "the longer liver of them" seem to have no meaning as applied to the word "heirs."] In that case *Powell, J.* differed from the rest of the Court; he says, speaking of the term *joint-tenants*, "No construction of an intent shall be received against such express words, for this would be to confound the text." The cases of *Turkerman v. Jeoffrys* (a) and *Barker v. Giles* (b) are clear authorities in favour of the defendant. In the latter case, there were the words "equally to be divided between them, share and share alike," and yet it was held that the devisees took as joint-tenants for their lives, with several inheritances, on account of the previous words "to Jerome and Robert Barker, and the survivor of them." That case is precisely in point; and there Lord Chancellor *King* says, "It is a certain rule in the exposition of wills especially, that every word shall have its effect, and not be rejected if any construction can possibly be put upon it; and here I think there may: the first part of the devise being to two and the survivor of them, makes them plainly joint-tenants for life, and therefore they shall be so taken; and then as to the next words, 'and to their heirs, equally to be divided between them, share and share alike,' these are plainly words importing a tenancy in common, and shall operate accordingly, so as to make them tenants in common of the inheritance, by which construction of the will every word takes effect." An estate in joint-tenancy cannot be better created by a devise to A. and B. and the survivor of them, than by a devise to A. and B. as joint-

(a) Holt, 307.

(b) 2 P. Wms. 250; 9 Mod. 157.

tenants. The decision in *Barker v. Giles* was afterwards affirmed on error by the House of Lords (a).

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

The Attorney-General, in reply.—It is now admitted that the parties will, under this devise, take several inheritances; and indeed it is clear that the words “their several and respective heirs” have as strong a technical meaning for creating a tenancy in common, as the word “joint-tenants” to create an estate of that nature. With respect to the argument that these parties took an estate as joint-tenants for life with several inheritances, that, it is submitted, would be contrary to the intention expressed in the will that they should take the estate “equally between them,” which shews the obvious intention of the testator to create a tenancy in common immediately. It is a matter of some doubt whether the species of estate contended for on the other side is one which the law would create, but it is not probable that it could have been the intention of the testator to have created an estate of so complicated a nature. The word “joint-tenants” is relied upon, but there is nothing to confine it to the estates for life. The Court must either reject altogether the words “equally between them” and “their several and respective heirs,” or give a construction to them which will create a tenancy in common. Admitting the doctrine that effect ought to be given, if possible, to every word in a will, and that none ought to be rejected, it does not apply here; for the lessor of the plaintiff is not calling on the Court to reject the words “to take as joint-tenants,” but to construe them as limiting the mode of enjoyment, and not as being used in their technical sense, affecting the quality of the estate.

Cur. adv. vult.

(a) 3 Bro. Parl. Ca. 297.

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—This was a special case, in which the question turned on the construction of a passage in the will of John Newham. Elizabeth Green, the defendant, and Jane Pearson, the mother of the two female lessors of the plaintiff, were the nieces of the testator. By his last will and testament, made in 1799, after devising certain estates comprised in the declaration in this ejectment for certain lives which have become extinct since his death, he gave and devised the same to his nieces Elizabeth Green and Jane Pearson, *equally between them, to take as joint-tenants, and to their several and respective heirs and assigns for ever.*

Both the nieces were living at the time of the testator's death, but when the last tenant for life died, Elizabeth Green, the defendant, had survived Jane Pearson, whose heirs-at-law, at that time, were her two daughters, the lessors of the plaintiff. Elizabeth Green took possession of the whole estate as surviving devisee, claiming a joint tenancy with her sister. The lessors of the plaintiff claim as heirs of Jane Pearson, who, as they insist, took an estate of inheritance as tenant in common with her sister.

The question then is, what estates the two nieces, Elizabeth Green and Jane Pearson, took under the devise to them.

For the lessors of the plaintiff it was contended that the words *equally between them*, and the words *their several and respective* heirs and assigns, had always been construed to make a tenancy in common, and many cases were cited, and not controverted, to prove that position, and further, to shew that where other words had been used along with these, more apt to describe a joint tenancy, yet the courts had rejected them, and given effect to the words which implied a tenancy in common.

For the defendant, on the other hand, it was contended

that no case could be found where the Court had rejected so plain a declaration as the present, that the devisees should take expressly as joint-tenants; that, therefore, if any words ought to be rejected, they were the words which were less plain and unambiguous, from which a tenancy in common was only to be inferred; that, therefore, the devisees took an estate as joint-tenants in fee, or at least as joint-tenants for life, with remainder to their heirs in common.

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

The Court, however, cannot consider the words heirs and assigns, in this will, as any other than words of inheritance, denoting the nature of the estate taken by the devisees themselves.

But we are of opinion that due effect may be given to all the words in this devise, by deciding that the devisees, the nieces, took an estate for their joint lives and the life of the survivor, that is, as joint-tenants, with remainder to each of them as tenants in common in fee after the death of the surviving life: in other words, that they took as tenants in common in fee, subject to an estate for their joint lives, and the life of the survivor. The authority for this construction is to be found in Littleton's Tenures, section 283, in which it is said, that "If lands be given to two men, and to the heirs of their two bodies begotten, in this case the donees have a joint estate for the term of their two lives, and yet they have several inheritances; for if one of the donees hath issue and die, the other which surviveth shall have the whole by the survivorship for the term of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, and the issue of the other shall have the other moiety of the land; and they shall hold the land between them in common, and they are not joint-tenants, but are tenants in common. And the cause why such donees in such case have a joint estate for term of their lives is, for that at the beginning the lands were given to them two,

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

which words without more saying make a joint estate to them for term of their lives. For if a man will let land to another by deed or without deed, not making mention what estate he shall have, and of this make livery of seisin, in this case the lessee hath an estate for term of his life; and so inasmuch as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot by any possibility have an heir between them ingendered, as a man and woman may have, &c., the law wills that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is to the heirs which the one shall beget of his body by any of his wives, and to the heirs which the other shall beget of his body by any of his wives &c., so as it behoveth by necessity of reason, that they have several inheritances. And in this case, if the issue of one of the donees, after the death of the donees, die, so that he hath no issue alive of his body begotten, then the donor or his heir may enter into the moiety as in his reversion &c., although the other donee hath issue alive, &c. And the reason is, forasmuch as the inheritances be several, &c., the reversion of them in law is several, &c., and the survivor of the issue of the other shall hold no place to have the whole."

It appears from the reasoning of Littleton, that the words "heirs of their two bodies" must of necessity give separate inheritances, because they can mean, in the case put, nothing else but their *several* and *respective* heirs of the body. And if an estate tail in common may be given by such words, denoting the several heirs of the body, there is no reason why an estate in fee in common may not be given by the like words, denoting the heirs general, as in the present case.

Accordingly, we find an express authority for words of a similar import giving an estate for life to two as joint

tenants, with an estate in fee to them as tenants in common, subject to the joint estate for life, in 2nd Peere Williams, 280, *Barker v. Giles*, and the same case in 3 Brown's P.C., 297, where the judgment of Lord King was affirmed by the House of Lords. That was a case of a devise of lands to be sold for the payment of debts and legacies, and the surplus to be laid out in lands, to be settled to the use of the testator's two nephews, Robert and Jerome Barker, and the *survivor of them and their heirs and assigns for ever, equally to be divided between them, share and share alike*.

Exch. of Pleas,
1838.

DOE
d.
LITTLEWOOD
v.
GREEN.

We are of opinion, therefore, in the present case, as Lord King was in that, that the devisees took an estate for their joint lives and the life of the survivor, upon the expiration of or subject to which, they took estates in fee simple as tenants in common. The ejectment, therefore, cannot be maintained during the life of Elizabeth Green, and there must be judgment for the defendant of non pros.

Judgment for the Defendant.

COWLING v. HIGGINSON.

TRESPASS for breaking and entering a close, called the Birchin Acre, and with divers horses, and the wheels of divers carts, waggons, and other carriages, crushed and damaged the grass of the plaintiff, of great value, to wit, 5 $\frac{1}{2}$ l, there then also growing and being, and with the feet of the said horses, and with the wheels of the said carts, their free will and pleasure. Replication, traversing such right:—*Held*, first, that under this issue the plaintiff might shew that the defendant had a right of way for horses, carts, waggons, and carriages for certain purposes only, and not for all, and was not compelled to new assign; and might shew that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which his right extended. Secondly, that evidence of user of a road with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but that the extent of the right is a question for the jury, under all the circumstances of the case.

Trespass qu. cl. fr. Plea, under 2 & 3 Will. 4, c. 71, a right of way for the occupiers of a close for 20 years, for horses, carts, waggons, and carriages, at

Exch. of Pleas,
1838.

COWLING
v.
HIGGINSON.

waggon, and other carriages, tore up, subverted, and damaged the earth and soil of the said close, &c.

Pleas, first, the general issue ; secondly, that the defendant, from a period long before and at the said several times when &c., in the said declaration mentioned, hath been, and then was and still is, in the lawful possession and the occupier of part of a certain close, called Little Marl Field, near to the said close in which &c ; and he further saith, that on the north of the said close in which &c., there was, and during all the time hereinafter mentioned hath been, and at the said several times when &c., there was and still is, a certain common and public highway leading between a certain place, to wit, Leigh, and a certain other place, to wit, Tildesley, and from each of those places to the other of them, in the county aforesaid ; and the defendant further saith, that he and all the occupiers of the said close in this plea first above mentioned, have actually as of right used and enjoyed, without interruption in respect of such occupation, for the full period of twenty years next preceding the commencement of this suit, and of right ought to have so used and enjoyed, and he the said defendant, being such occupier as aforesaid, at the several times when &c., as of right used and enjoyed, and still of right ought to use and enjoy, the liberty, privilege, benefit, and easement, as often as he or they might have occasion, to go, return, pass, and repass on foot, and with horses, carts, waggon, and carriages, from the said close first above mentioned to the said highway between Leigh and Tildesley aforesaid and back again, of going and to go from and out of the said close first above mentioned, and to pass and repass on foot, and with horses, carts, waggon, and carriages, from the said close into and along a certain way leading from the said close first above mentioned to the said close in which &c., and from thence unto, into, by, through, over, along, and across the said close in which &c., unto and into a certain other way

leading from the said close in which &c., to the said highway so on the north side of the said close in which &c., as aforesaid, and so back again from the said highway into the said last mentioned way, and from thence, unto, into, by, through, over, along, and across the said close in which &c., and thence into the said first mentioned way unto and into the said close first above mentioned, at all reasonable times of the year at his and their free will and pleasure: wherefore the defendants, at the said several times when &c., the same then being reasonable times for that purpose, having occasion to use the way in this plea mentioned, then went, passed, and repassed on foot, and with the said horses, and with the said carts, waggons, and other carriages, from and out of the said close first above mentioned, into the said first mentioned way, and thence out, into, by, through, over, along, and across the said close in which &c., into the said other way as aforesaid, and thence unto and into the said highway so on the north side of the said close in which &c., and so back again from the said highway into the said other way above mentioned, and thence unto, into, by, through, over, along, and across the said close in which &c., and thence into the said first mentioned way, unto and into the said close first above mentioned, using the said way there for the purpose and on the occasions aforesaid, as he lawfully might for the cause aforesaid, and in so doing the said defendant, with the said horses, and with the wheels of the said carts, waggons, and other carriages, unavoidably a little crushed and damaged the said grass of the plaintiff then growing and being in and upon the said close in which &c., and with the feet of the said horses, and with the wheels of the said carts, waggons, and other carriages, a little tore up, subverted, and damaged the said earth and soil of the said close, doing no unnecessary damage to the plaintiff or the occupiers aforesaid, which are the said several trespasses in the declaration above mentioned, and

Exch. of Pleas,
1838.

COWLING
v.
HIGGINSON.

Exch. of Pleas,
1838.

COWLING

^{v.}
HIGGINSON.

whereof the plaintiff hath above thereof complained against him.

The third plea was similar, only stating the user for forty years instead of twenty.

The replication traversed both these pleas.

At the trial before *Coleridge, J.*, at the last Spring Assizes at Liverpool, it was admitted that there was a right of way for farming purposes over the locus in quo, to a farm, of one of the fields of which, called the Little Marl Field, the defendant was the occupier; but the plaintiff's counsel contended that there was no right of carting coals, which was the purpose for which the defendant had used the road; and it was proved by the plaintiff that no coals had been raised under that farm for the last 70 years; that about 70 years ago there had been coal raised there, but that they were carted from the pit along a different road; that Tildesley, to which the road led, was then a very small village, consisting of merely a few houses; that there were then other coal pits nearer than those on the defendant's farm; and that there was a gate across this road, the key of which was kept by a tenant of the plaintiff's ancestor. The defendant's counsel then objected, first, that the issue was, whether there was a right of way for horses, carts, and carriages; and that since it was admitted that such right existed, the verdict ought to be for the defendant; and that if the plaintiff relied on the defendant's using the road for mining purposes, and that he had no such right, he ought to have new assigned: and secondly, that a right of road for farming purposes, and with horses, carts, and carriages, proved a right for all purposes. The learned Judge, after consulting *Patteson, J.*, decided both points in favour of the plaintiff; and the defendant's counsel not claiming to have any question left to the jury, the learned Judge directed them to find a verdict for the plaintiff, giving leave to the defendant to move to enter a verdict, if the Court should be of a contrary

Opinion on either of the points taken. *Alexander* having, *Exch. of Pleas,*
in Easter Term last, obtained a rule accordingly, 1838.

COWLING
v.
HIGGINSON.

Cresswell, Starkie, and Wortley, now shewed cause.—
The learned Judge was right in deciding that the general
traverse of the right as pleaded, was sufficient, and that
no new assignment was necessary. The object of a new
assignment is to point out something included in the
declaration, but which is not mentioned in the plea. In
this case, the plea is large enough to cover the trespasses
included in the declaration, and no new assignment was
necessary; and the objection at the trial, that the plaintiff
could not go into the question of a right to carry a
particular species of produce, such as coals, upon these
pleadings, was properly overruled: Then, as to the effect
of the evidence, there was no proof of any user of this
way for the purpose of carrying coal, and by the non-user
of it for such a purpose sixty years ago, when coal was
raised on this property, a presumption arises that there
was no right of way for the carriage of such produce.
This is a plea of user under the recent statute 2 & 3
Will. 4, c. 71; and the defendant, by so pleading, instead
of pleading a general prescriptive right, confines himself
to what he has actually enjoyed within the period of
twenty years; and such a plea can only be supported by
proof of actual enjoyment of the way for all purposes.
It is the absence of interruption for the period of twenty
years which, under this statute, gives him the right, and
if he does not shew a user of the way for all purposes, the
plaintiff could have no opportunity of obstructing him in
the exercise of such a general right. The right here
pleaded is in the most general terms possible, and can only
be supported by proof of a user co-extensive with it. In
Ballard v. Dyson (a), it was held that the extent of the user
is evidence of a right only commensurate with the user.

(a) 1 Taunt. 279.

Exch. of Pleas,
1838.

COWLING
v.
HIGGINSON.

[*Parke, B.*—In that case *Chambre, J.*, differed in opinion from the other Judges.] That case was in its circumstances very different from the present. If a party wishes to shew that he has a more extensive right than that which he has actually enjoyed, he ought not to plead this plea. Suppose that fifty years ago the defendant had attempted to carry coals along this road, and that he had been obstructed, and had acquiesced in the obstruction, and that for a period less than twenty years he had used the way for that purpose, could it be said that he might plead this plea? In *Rex v. Marquis of Buckingham (a)*, it was held that the existence of a bar across a public bridge, kept locked except in times of flood, was conclusive evidence that the public had only a limited right to use the bridge at such times; and an indictment for not keeping it in repair, stating it to have been used by all the King's subjects "at their free will and pleasure," was held ill on the ground of variance. There is a great difference between a public and a private road, but even in the former the right may be limited: *Marquis of Stafford v. Coyney (b)*, where it was held that there might be a right of road for all purposes except that of carrying coals. The case of *Jackson v. Stacey (c)* is precisely in point; there there was a general plea of a right of way, as here, with this advantage, that it was not confined to the period of twenty years, and *Wood, B.*, ruled that evidence of the user of a way for agricultural purposes did not support the plea of a right of way for all purposes, but was evidence of a qualified or limited right only: it was held, therefore, that where A. claimed and proved a right to carry corn and manure over the locus in quo, he had not therefore a general and unlimited right to carry lime, or the produce of a quarry, at all times and for all purposes. In *Drewell v. Towler (d)*, which was trespass for cutting lines of

(a) 4 Campb. 189.

(b) 7 B. & Cr. 257.

(c) Holt's N. P. C. 455.

(d) 3 B. & Adol. 735.

the plaintiff, and throwing down linen thereon hanging, the defendant pleaded that he was possessed of a close, and because the linen was wrongfully in and upon the said close, he removed it; to which the plaintiff replied that J. G., being seised in fee of the close, and of a messuage with the appurtenances contiguous to it, by lease and release conveyed to W. H. the messuage and all the easements, liberties, privileges, &c., to the said messuage belonging, or therewith then or late used, &c.; that before and at the time of such conveyance the tenants and occupiers of the messuage used the easement, &c., of fastening ropes to the said messuage and across the close to a wall in the said close, in order to hang linen thereon to dry, as often as they had occasion so to do, at their free will and pleasure, and that the plaintiff being tenant to W. H. of the said messuage, did put up the lines &c. The rejoinder took issue on the right as alleged in the replication; and it was held, that proof of a privilege for the tenants to hang lines across the yard for the purpose of drying linen for their own families only, did not support the alleged right; on the ground, that the right claimed by the plaintiff was larger than that proved. That is expressly in point; there the evidence of hanging linen to dry was evidence to go to the jury of a general right, as much as in the present case. [*Parke, B.*—Suppose that instead of being a plea under the statute, this had been a plea for the larger prescription in the terms in which it is usually pleaded, would not that have been supported by shewing, that upon every occasion when it was required to take carts that way, they had done so?] That might be a question for the jury. But here the way was only used for agricultural purposes; and though there was evidence of the getting of coal in the defendant's close seventy years ago, it was carried another way. [*Parke, B.*—If it had been shewn, that from time immemorial it had been used as a way for all purposes that were required, would not that

Exch. of Pleas,
1838.

COWLING
v.
HIGGINSON.

Exch. of Pleas,
1838.

COWLING

^{v.}
HIGGINSON.

be evidence of a general right of way? Can you refer me to a plea of right of way for agricultural purposes only?] Such a plea is to be found in *Reignolds v. Edwards* (a); and a precedent of a declaration for the obstruction of a right of way for the carriage of coals, is to be found in *Iveson v. Moore* (b). If pleaded too largely, it is fatal, as appears from *Drewell v. Towler* and *Jackson v. Stacey*. The general rule of pleading is, that it must be shewn what sort of purpose the way is used for, whether for persons on foot, or horses, or carriages: Com. Dig. Chimin Priv. B.; Vin. Abr. Chimin Priv. H.; 1 Roll Abr. 391. Here the claim is in the most ample terms. In the absence of the grant itself, on which the right is supposed to be founded, the user must be looked to; in this case the right is claimed generally, but the user limits the right, for no user has been shewn for the carriage of coal, but only for agricultural purposes, and therefore the plea is not supported. [Lord Abinger, C. B.—The extent of the right must depend upon the circumstances. If a road led through a park, the jury might naturally infer the right to be limited; but if it went over a common, they might infer that it was a way for all purposes. Using a road as a footpath would not prove a general right; nor proof that a party had used a road to go to church only. Some analogy should be shewn between farming and mining purposes—do not agree with the opinion of Mr. Justice Chamberlain in *Ballard v. Dyson*, but think that of the rest of the Court is preferable. Parke, B.—If they shew they have used the time out of mind, for all the purposes that they wanted, it would seem to me to give them a general right.] That would be a question for the jury. Here we shewed that they had carried coals a different way. [Parke, B.—That would tend to shew that the way was not used for all the purposes it was required. You contend that the loading of the carriage constitutes the difference; that

(a) Willes, 282.

(b) 3 Lord Raym. 291; 1 Salk. 15; Carth. 451

Exch. of Pleas,
1838.

COWLING
v.
HIGGINSON.

there may be a right to carry corn and manure, though not coals.] The actual user limits the extent of the right; it was proved that although the owners of this land had coals to carry, they had not been carried over this way but another, therefore the right was negatived in particular as to coals. [Lord Abinger, C. B.—But that obstruction, if any, was not within the twenty years.] It is not contended that there might not be a case to go to the jury. Suppose that for the last twenty years they had only wanted to pass on foot—the statute gives no right of pleading the actual enjoyment for some purposes, and if proved to have been so used for some purposes, it does not follow that they shall be entitled to use it for all. The statute makes no alteration as to the mode in which a right of way may be acquired, but only allows it to be acquired within a shorter time. The condition, however, upon which it is to be acquired, is actual enjoyment of the right without interruption. Here there has been no enjoyment of a right for the carriage of coals, for none were produced upon this land during that period until very recently. [Parke, B.—But there has been an actual enjoyment during that period of a right of way for carts and carriages.] That was for some purposes only, and it never could be the intention of the act that the enjoyment of a right of way for some purposes should give a right for all. As to the general law, a way can only be claimed by prescription, or grant, or of necessity: and in the case of a grant, or prescription, which presupposes a grant, the way must be continued according to the extent of its original creation, without prejudice to the grantor: Roll. Abr. 394, *Howell v. King* (a). There it was held that if A has a way from B to C., and occupies lands beyond C., he cannot justify using the way to those lands. It may be more prejudicial to the grantor to alter the user, than to alter the way by

(a) 1 Mod. 191.

Exch. of Pleas,
1838.

—
COWLING
v.
HIGGINSON.

extending its termination, as by converting a private building into a manufactory and using it for the purpose of the manufactory. [*Parke, B.*—You must generalise to some extent. If your argument is to be taken strictly, it must be confined to the identical carriages that have previously been used upon the road, and would not warrant even the slightest alteration in the carriage or the loading, or the purpose for which it was used.] When that difficulty is arrived at, it is a question of fact for the jury, but here it must be considered that the jury have negatived the right to use the way for the carriage of coal. To support this plea, the defendant ought to have shewn actual enjoyment of the way for all purposes for the full period of twenty years, which he has not done. The pleas under the statute are founded upon actual enjoyment.—They cited also *Bright v. Walker* (a), and *Monmouthshire Canal Company v. Harford* (b).

Alexander and Wightman, in support of the rule.—The right of way set up in the plea was distinctly proved by the evidence. The declaration charges the defendant with breaking and entering the plaintiff's close, and with horses, carts, and carriages, subverting the soil; and the defendant has shewn by evidence that he has a right to enter the close with horses, carts, and carriages. The evidence shewed a user of the way for any purposes for which it was wanted, and that it was never interrupted: and therefore the issue was proved on the part of the defendant. At the time that the coal was raised, sixty or seventy years ago, it appeared from the evidence, that Tildesley consisted of only three or four houses, and that there were coal-mines nearer to Tildesley than this property, which will account for the coals being carried in a contrary direction to a more populous neighbourhood. [*Parke, B.*—The coals were raised on the same estate in respect of which the

(a) 1 C. M. & R. 217.

(b) *Ibid.* 614.

right of way was claimed. Should you not have asked the learned Judge to submit that question to the jury, and urged that this was not confined to a right for particular purposes only?] The new trial was applied for on the ground that the learned Judge had not submitted that question to the jury. In this case, what would have been proved by the defendant that was not proved by the plaintiff? It was proved that the way was used by the owners and occupiers of the defendant's land, whenever and for whatever purposes they wanted to use it. If it was necessary to prove the user of the way for every specific purpose that might afterwards be required, no way could be supported. It would be a manifest injustice to put that construction on the statute as to actual user. [Lord Abinger, C. B.—All that the plaintiff contends is, that the jury are to infer from user for all purposes a general right, or from limited user a limited right. Parke, B.—It has been rather conceded than proved, that the way has been used for all purposes that were required.] In *Jackson v. Stacey*, it is expressly assumed, that the jury had found that the way was used for agricultural purposes only. In *Ballard v. Dyson*, Chamber, J., was of opinion against the other three judges. [Parke, B.—To apply his doctrine in the present case, he would say that it was evidence to be left to the jury of the right to go with carts however loaded.] Certainly. In *Rex v. Lyon (a)*, the exception was distinctly proved. *Rex v. Marquis of Buckingham* is manifestly distinguishable. Here there is no locking of the gate against any thing going through. There is, therefore, no proof of any interruption to the right of way claimed and proved.

Exch. of Pleas,
1838.

COWLING
v.
HIGGINSON.

LORD ABINGER, C. B.—I do not give any opinion upon the effect of the evidence; but I should certainly say that it is not a necessary inference of law, that a way for agri-

(a) Ry. & Mo 151.

Exch. of Pleas,
1838.

COWLING
v.
HIGGINSON.

cultural purposes is a way for all purposes, but that it is a question for the jury in each particular case, to be determined upon the various facts established in each case. If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shews a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed. I wish to say nothing as to the inference to be drawn by the jury in this particular case. The question is entirely for them to determine on the facts submitted to them. I think there ought to be a new trial on payment of costs.

PARKE, B.—I am clearly of opinion that the defendant is not entitled to succeed on the question as to the new assignment. [He then stated the plea]. To make out this plea, it is necessary to shew an enjoyment of the way generally *as of right*, for the period during which the plea states it to have been used; he must have used it for all purposes as of *right*; and such user, for all purposes for which it was wanted, would be evidence to go to the jury of a general right. Under a plea of prescription of a way, it was necessary to shew a user of it for all purposes time out of mind, according to the usual terms in which such a plea is pleaded. If it is shewn that the defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to shew that they had a general right to use it for all purposes, and from which a jury might infer a general right. In this particular case, I think the user is evidence to go to the jury that the defendant had a right to a way for all purposes for twenty years. As to the *effect* of such evidence, it is unnecessary to offer any opinion. If the way is confined to a particular purpose, the jury ought not to extend it, but if it is proved to have been used for a variety of purposes, then they might be warranted in find-

ing a way for all. You must generalise to some extent, and whether in the present case to the extent of establishing a right for agricultural purposes only, is a question for the jury.

Exch. of Pleas,
1838.

COWLING
v.
HIGGINSON.

Rule absolute for a new trial, on
payment of costs.

In re SCOTT and Others.

MAULE, in a former term, had obtained a rule calling upon the *Attorney-General* and others interested in this matter, to shew cause why the recognizances which had been entered into by Scott and his sureties, for the prosecution of an election petition, should not be vacated. At the election for the county of Merioneth, in the year 1836, Mr. Richards was elected, Sir William Wynne being the unsuccessful candidate. A petition against the return was presented by Mr. Scott, and he, and Mr. Silver and the Rev. John Nanney as his sureties, entered into the recognizances required by the 9 Geo. 4, c. 22, s. 5, which enacts, "That no proceeding shall be had upon any such petition, unless the person or persons subscribing the same, or some one or more of them, shall, within fourteen days after the same shall have been presented to the House, or within such further time as shall be limited by the House, personally enter into a recognisance to our Sovereign Lord the King, according to the form hereunto annexed, in the sum of 1,000*l.*, with two sufficient sureties in the sum of 500*l.* each, or four sufficient sureties in the sum of 250*l.* each, for the payment of all costs, expenses, and fees, which shall become due to any witness summoned in behalf of the person or persons so subscribing such petition, or to any clerk or officer of the House,

Where a petition is presented to the House of Commons against the return of a member, and at the day appointed for taking the petition into consideration, the petitioner fails to appear, and the order for taking it into consideration is discharged, the Speaker has power under the 9 Geo. 4, c. 22, s. 60, to cause the costs of the sitting member to be taxed; and if the amount be not paid within six months after demand, he has power by section 65, to certify the recognizances entered into by the petitioner and his sureties into the Exchequer, and that default has been made in payment; upon which the recognizances are to have the same effect as if estreated in a court of law.

nizances are to have the same effect as if estreated in

Exch. of Pleas,
1838.

In re
SCOTT.

upon the trial of such petition, *or to any party who shall appear before the House, or any Committee of the House, in opposition to such petition, in case such person or persons shall fail to appear before the House, at such time or times as shall be fixed by the House for taking such petition into consideration; or in case such petition shall be withdrawn by the permission of the House; or in case such committee shall report to the House, that such petition appears to them to be frivolous or vexatious."*

On the day appointed for taking the petition into consideration, the petitioner not appearing, the order for taking it into consideration was discharged, whereupon the Speaker caused the costs of the sitting member to be taxed, and delivered his certificate of their amount pursuant to the 60th section of the same act, which enacts—"That the costs and expenses of prosecuting or opposing any petition, presented under the provisions of this act, and the costs, expenses, and fees which shall be due and payable to any witness summoned to attend before such committee, or to any clerk or officer of the House of Commons, upon the trial of any such petition, shall be ascertained in manner following, (that is to say), that on application made to the Speaker of the House of Commons within three months after *the determination of the merits of such petition*, by any such petitioner, party, witness, or officer as before mentioned, for ascertaining such costs, expenses, or fees, the Speaker shall direct the same to be taxed by two persons," [the act here describing who they are to be], "and the persons so authorized and directed to tax such costs, expenses, and fees, shall and they are hereby required to examine the same, and to report the amount thereof, together with the name of the party liable to pay the same, to the Speaker of the said House, who shall, upon application made to him, deliver to the party or parties a certificate signed by himself, expressing the amount of the costs, expenses, and fees, allowed in such report, together with the name of the party liable to pay the same; and the

persons so appointed to tax such costs, expenses, and fees, and to report the amount thereof, are hereby authorized to demand and receive for such taxation and report such fees as shall be from time to time fixed by any resolution of the House; and such certificate so signed by the Speaker shall be conclusive evidence of the amount of such demands in all cases, and for all purposes whatsoever." The petitioners having neglected to pay these costs, the petitioner certified the recognisances into this Court, under the 65th section, by which it is enacted—"That if any petitioner or petitioners who shall have entered into such recognisance as aforesaid, shall neglect or refuse, for the space of seven days after demand, to pay to any witness who shall have been summoned on his or their behalf, before the House or such select committee, on the trial of such petition, the sums so certified as aforesaid by the Speaker to be due to such witness, together with the further sum of forty shillings per diem for every day, during which such petitioner or petitioners shall delay to satisfy the same; or if such petitioner or petitioners shall neglect or refuse, for the space of six months after demand, to pay to any officer of the House, or to any party who shall appear in opposition to the said petition, the sum so certified by the Speaker as aforesaid to be due to such officer or party, for their fees, costs, or expenses, and that such neglect or refusal shall be proved to the Speaker's satisfaction by affidavit sworn before any Master of the High Court of Chancery, and such Master is hereby authorized to administer such oath, and is authorized and required to certify such affidavit under his hand; in every such case, such person or persons shall be held to have made default in his or their said recognisance; and the Speaker of the House of Commons shall thereupon certify such recognisance into the Court of Exchequer, and shall also certify that such person or persons have made default therein, and such certificate shall be conclusive evidence of such

Exch. of Pleas,
1838.

In re
SCOTT.

Exch. of Pleas,
1838.

In re
SCOTT.

default, and the recognisance being so certified shall have the same effect as if the same were estreated from a court of law." The rule was applied for and obtained on the ground that the latter section only gave the Speaker power to tax the costs in cases where a decision had been come to by a committee upon the merits of the petition, and did not apply to a case like the present, where no such determination had been come to; and therefore the costs not being legally due, the recognisances had not been forfeited, and ought to be taken off the file.

Sir W. Follett, in Easter term last, shewed cause against the above rule, citing *Bruyeres v. Halcomb* (a); and *Maul* was heard in support of the rule; but the arguments, and the several clauses of the act of Parliament which apply to the question, are so fully stated in the judgment, that it is not thought necessary to report them.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B.—An application was made some terms ago, but not argued until late in the last term, to take a recognisance off the file, which had been certified into this court by the Speaker of the House of Commons, pursuant to the 9 Geo. 4, c. 32, s. 65. The facts were, that a petition was presented against the return for the county of Merioneth, and the usual recognisance was entered into, but the petitioner omitted to appear before the House on the day fixed for hearing the petition, in consequence of which no committee was struck for the trial of the merits of the election. The Speaker, however, caused the costs to be taxed by the persons pointed out by the 60th section, and the petitioner having refused, for six months after

(a) 3 Ad. & Ellis, 381; 5 Nev. and Man. 149.

the demand of the amount, to pay them to the party petitioned against, the Speaker certified the default and recognisance into this Court. The question is, whether he had power to do so, and the recognisance can be enforced.

Exch. of Pleas,
1838.

In re
SCOTT.

This question depends upon the construction of the statute 9 Geo. 4, and the only difficulty in the case, upon the face of the statute itself, arises from the wording of the 60th section, which, taken to the letter, appears to authorize a taxation of costs only in the case where there has been a determination of the merits of the petition; and the Speaker is to certify *such* costs only, and in the event of the non-payment of the costs so certified, and those only, is he authorized to certify the recognisance into the Exchequer. It is not contended, on the part of the Crown, that the Speaker can certify such a recognisance into this Court at common law: certainly, his certificate of the default would not be binding and conclusive; and it is, therefore, argued on the part of the conusors, that in the event which has happened, as the recognisance could not be certified under the statute, it has never been forfeited at all, and ought to be taken off the file.

The act in question is not very carefully drawn, and there are difficulties in the way of the construction contended for on both sides. In order to give effect to that offered on the part of the Crown, the words of the 60th section must be qualified, and construed to mean, that the costs are to be taxed within three months after the determination of the merits of such petition, *if such determination should take place*, otherwise at any time; on the other hand, the construction proposed by the conusors renders one clause of the condition of the recognisance inoperative. The recognisance is rendered defeasible if the conusors "shall pay the costs and expenses of the party who shall appear before the House in opposition to the petition, in case the petitioner shall fail to appear

Exch. of Pleas,
1838.

In re
SCOTT.

before the House at the time fixed for taking the said petition into consideration, or in case the petition shall be withdrawn, or in case the select committee shall vote the petition to be frivolous and vexatious;" and it is not merely a clause in the recognisance stated in the schedule, which might have been copied incautiously from that in the 53 Geo. 3, but in the enacting part of the statute itself, section 5, it is provided that the recognisance shall be so conditioned.

We must, therefore, in construing the statute, either modify the language of the 60th section, or wholly strike out a part of the recognisance, and read it as if the condition were to pay only in case the petition was voted frivolous and vexatious; of these two courses, if we are to determine the question of construction by the terms of the act itself alone, the one which does the least violence to the words of the legislature is to modify the language of the 60th section in the manner proposed; and that done, we give effect to every enactment of the statute; we make every part of the recognisance operative, and enable the speaker to direct the costs to be taxed in every case, and not only does this construction of the act do the least violence to its words, but is most consistent with one of the manifest objects of the legislature, the prevention of vexatious petitions. If the construction contended for on the part of the petitioner were to prevail, petitions might be presented for the purpose of vexation and annoyance, or with a view of disabling a member from serving on committees, and abandoned at the last moment without any evil consequence, under the act, to the parties petitioning or their sureties; and the petitioners might thus, by their own mere authority, in effect, withdraw a petition, which, by the 9th section, the House itself is prevented from permitting them to do, except in certain cases. The argument on the other side is, that it would be an advantage to the sitting members, that their opponents

should have this *locus penitentiæ*, by which they might save both parties the expense of litigation before a committee; but this argument may be answered, on the other side, by the observation, that according to the construction contended for by the Crown, there will be the same *locus penitentiæ*, if the sitting member chooses to give it, by agreeing, that, provided the petitioner should abstain from appearing before the House on the day fixed, he would forego the claim for his costs, and not procure them to be taxed.

Erch. of Pleas,
1838.

In re
SCOTT.

The view, therefore, that we take of the act itself, adopting the usual rules of construction, and considering the object of the legislature, apparent on the face of the act, is, that the recognisance has been forfeited in this case, and duly certified into this Court.

But it is said that a reference to the statutes on this subject, which the 9 Geo. 4, was to consolidate, amend, and simplify, ought to lead us to a different conclusion, and that from that reference, coupled with the act in question, it will appear to have been the intention of the legislature to have taken away from the party petitioned against the right to his costs if the petition was abandoned, and the petitioner did not appear in the House at the day appointed. The examination of the provisions of these statutes, though it has induced us to entertain more doubt than we should have done on the purview of the statute 9 Geo. 4 alone, does not lead us to this conclusion.

The statutes to be examined are the 28 Geo. 3, c. 52, and 53 Geo. 3, c. 71.

The 28 Geo. 3, c. 52, is the first statute which requires a recognisance. Section 5 enacts, that no proceeding shall be had on any petition, unless a recognisance is entered into, in a certain time, in the sum of 200*l.*, with two sureties in 100*l.* each, the condition of which is, that the petitioner is to appear on the day fixed for taking the petition

Exch. of Pleas,
1838.

In re
SCOTT.

into consideration, and also to appear before any select committee that shall be appointed for the trial of the petition, and shall renew the same until the committee should have been appointed, or the petition withdrawn by permission of the house. This recognisance, it is to be observed, is not for payment of costs, but becomes absolute in default of appearance; and section 9 empowers the Speaker to certify it to the Court of Exchequer. Sections 19, 20, and 21 give costs to the sitting member if the petition is voted frivolous and vexatious, and to the petitioner if the opposition to the petition is voted to be of that character: and also provides for costs in the case where no party appears before the committee in opposition to the petition; all which costs the Speaker is authorized upon application to be caused to be taxed, in the manner pointed out by the 22nd section, and the costs, when certified, may be recovered by an action of debt. As the law stood, therefore, by this act there was no specific remedy for the costs of the sitting member, incurred in preparing to defend his seat, in case the petitioner did not appear before the House on the day appointed to take the petition into consideration; but the recognisance was forfeited by non-appearance; it could not be saved by the payment of any costs, and the penalty became a debt to the Crown.

The 53 Geo. 3, c. 71, reciting that it is expedient to make provision to secure the more punctual payment of costs, expenses, and fees which may become due to witnesses, officers of the House, and parties, by reason of the trial of controverted elections, requires an additional recognisance in 1,000*l.*, with two sureties in 500*l.* each, for the payment of costs to witnesses, clerks, and officers, and likewise to the party appearing before the House in opposition to such petition, in case the petitioner shall fail to appear before the House at the time fixed for taking the petition into consideration, as also if the petition shall

be withdrawn; as well as for the payment of costs in case the committee shall vote the petition frivolous and vexatious. This statute also provides, by section 9, that in all cases where the petitioner shall fail to appear before the House at the time fixed for the appointment of the select committee, the order for taking the petition into consideration shall be thereupon discharged, and the parties attending in opposition to the petition shall be entitled to recover from the petitioner the expenses which they shall have incurred by reason of the petition, and they are to be recovered in the same manner as the other costs provided for by that statute, that is, as costs were levied under the former statute when the petition was voted frivolous and vexatious. By section 12, in default of payment the recognisance is to be estreated. By section 13, the Speaker's certificate with respect to costs under that act or the 28 Geo. 3, was to operate as a warrant of attorney.

Exch. of Pleas,
1838.

In re
SCOTT.

The effect of this act was to give a remedy for the costs incurred, in case of a non-appearance, both by the forfeiture of the recognisance and by action of debt, on the Speaker's certificate. The act also provides, for the first time, by the form of the recognisance, for the payment of costs in case the petition should be withdrawn, which is permitted by section 8, the former statute of 28 Geo. 3, having prohibited the House from allowing it, unless in the event of the vacancy of the seat by death or otherwise: but it is worthy of remark, that the 53 Geo. 3, nowhere gives any power in express words to the Speaker to tax the costs in this case.

The 9 Geo. 4 was then passed, in order to consolidate the law relating to the trial of controverted elections. At the time it passed, two recognisances were required, (and they are reduced into one), and the provisions for the taxing and recovery of costs were contained in different sections of the two acts of the 28 Geo. 3, and 53 Geo. 3. The 19th, 20th, and 21st sections of the former act provided

Exch. of Pleas,
1838.

In re
SCOTT.

for the case of a committee sitting and voting the petition or opposition frivolous and vexatious, or the return corrupt or vexatious, in which several cases application is to be made to the Speaker, and the costs taxed. The seventh section of 53 Geo. 3, applied to the costs and fees of witnesses, clerks, and officers, and the 9th, 10th, and 11th sections of the same statute provided for the case of the petitioner failing to appear before the House on the day fixed, and there was no provision at all for such taxation in the case of the petition being withdrawn. The 57th, 58th, and 59th sections of the 9 Geo. 4, re-enact the provisions as to costs given in case the committee meet by the 19th, 20th, and 21st of 28 Geo. 3; then both the mode of taxation of costs, of prosecuting or opposing a petition, which, in 28 Geo. 3, s. 22, is confined to the third case before mentioned, is, by the 60th section of 9 Geo. 4, left at large: and this last section provides for "the costs and expenses for prosecuting and opposing any petition," not for the costs and expenses in the several *cases before mentioned*, as had been done by the 22nd section of 28 Geo. 3; the same 60th section also provides for the costs due to witnesses, clerks, or officers, which had been provided for by section 7 of the 53 Geo. 3, thus incorporating the two sections together, and providing for the taxation of costs, whether payable to parties, witnesses, clerks, or officers. There is, however, no clause corresponding with the 9th section of 53 Geo. 3, expressly making the petitioner liable to the costs in case of not appearing in the House on the day fixed, and it is on the absence of such provision that much stress was laid on the part of the petitioner. We do not mean to say, that the argument is not entitled to much consideration, and that it has not created some doubt in our minds upon the present question; but we think that its omission may be accounted for, by supposing that the legislature may have intended to give no remedy for these costs by action, as it had done under the 53 Geo. 3; but the remedy on the recognisance would still continue.

Upon the whole, we think that upon the true construction of the 9th Geo. 4, the recognisance had been forfeited: and this view of the case is fortified by the opinion of the Court of King's Bench, expressed, though extrajudicially, in the case of *Bruyeres v. Halcomb* (a).

Exch. of Pleas,
1838.

In re
SCOTT.

Rule discharged.

THOMAS and Others, Assignees of BROWN and CHEETHAM,
Bankrupts, v. CONNELL.

ASSUMPSIT for money had and received to the use of the plaintiffs as assignees, and upon an account stated with them as such assignees. At the trial before *Cole-ridge, J.*, at the last Liverpool assizes, it appeared that the action was brought to recover a sum of money alleged to have been paid by Cheetham to the defendant by way of fraudulent preference; and before any evidence had been given of the bankruptcy or insolvency, a witness was asked what had been said to him by Cheetham, in November, 1836, (the fiat in bankruptcy having been issued in January, 1837), with reference to a debt due to a person of the name of Maguire. The question was objected to, on the ground that the supposed declaration of Cheetham was not connected with any act done by him, and therefore could not be used; but the learned judge overruled the objection, and received the answer as evidence that Cheetham was at that time aware of the insolvent condition of himself and his partner, and intended a fraudulent preference in the payment afterwards made to the defendant. The jury, under his Lordship's direction, found a verdict for the plaintiffs. Sir *F. Pollock*, in Easter Term, had obtained a rule to shew cause why there should not be a new trial, on the ground that the declaration of Cheetham, unaccom-

Declarations of a person in insolvent circumstances, tending to shew that he knew of his insolvency, are admissible in evidence to prove such knowledge, provided the fact of his insolvency be proved aliunde.

Semle, that the fact of insolvency should be proved before the declarations are offered in evidence.

(a) 3 Ad. & Ell. 381.

Exch. of Pleas,
1838.

THOMAS
v.
CONNELL.

panied by an act done at the time, ought not to have been received in evidence.

Cresswell, Alexander, and Wightman, now shewed cause. The declarations of Cheetham were admissible to shew that he was in insolvent circumstances, and that he knew that he was so, and contemplated bankruptcy, in order to make out that this was a fraudulent preference. There are many cases where similar declarations, for the purpose of shewing motives or knowledge, have been received: *Bateman v. Bailey* (a), *Ridley v. Gyde* (b), *Smith v. Cramer* (c), *Vacher v. Cocks* (d). These are clear authorities in favour of the admissibility of these declarations. In all cases of fraudulent preference, the material question is, what was operating on the mind of the bankrupt at the time.

W. H. Watson and J. Henderson, in support of the rule—The declarations were not admissible, inasmuch as they were not accompanied by any act done by Cheetham. In *Vacher v. Cocks*, the declarations of the bankrupt were connected with the payments in point of time, and that case has therefore no application. In *Abbott v. Pomfret* (e), the defendants, who were B.'s bankers, had discounted for B. a bill payable January 10th, drawn by B. and guaranteed by L.; on the 3rd January, B., being in insolvent circumstances, gave L. a cheque on the defendants for the amount of the bill: the defendants, on receiving the cheque, handed the bill over to L.; B. became bankrupt on the 9th of January; and it was held that his assignees could not sue the defendants as having received the amount of the cheque by way of fraudulent preference. [*Parke, B.*—In that case no money was given to the defendants; the preference was made to L.] The distinction in the cases is, that where a declaration is not

(a) 5 T. R. 512.

(b) 9 Bing. 349.; 2 M. & Scott.

448.

(c) 1 Bing. N. C. 585.; 1 Scott, 541.

(d) Mo. & Malk. 353.

(e) 1 Bing. N. C. 462.; 1 Scott, 470.

accompanied by an act, it is not admissible. In *Lees v. Marton* (a), it was held that the declarations of a bankrupt, made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. The true principle is laid down by Lord Denman, C. J., in delivering the judgment of the court in *Peacock v. Harris* (b), that a contemporaneous declaration may be admissible as part of a transaction, but an act done cannot be varied or qualified by insulated declarations made at a later time.

Exch. of Pleas,
1838.

THOMAS
v.
CONNELL.

LORD ABINGER, C. B.—If the declaration of the bankrupt had stood alone, and without connexion with the other evidence in the case, such a declaration would not be admissible; but, coupled with the subsequent evidence, the fact of insolvency at the time being established, the declaration of the bankrupt was, I think, admissible for the purpose of shewing that he knew of his insolvency. Then, whether there was sufficient evidence of a fraudulent preference, was a question for the jury.

PARKE, B.—I concur in thinking that this rule ought to be discharged. I very much doubt, however, whether the statement made by the bankrupt was properly admissible at that particular stage of the cause in which it was offered. I have always understood the general rule to be, that a verbal statement is not receivable in evidence, unless made at or about the time of an act done, and in order to explain that act; as for instance, if it is offered to explain a person's absence from home, and is made just before or just after his departure. But, on the other hand, if a fact be proved aliunde, it is clear that a particular person's knowledge of that fact may be proved by his declaration, as was the case in *Vacher v. Cocks*. And under the impression that such evidence was admissible after proof of the

(a) 1 Moo. & Rob. 210.

(b) 5 Adol. & Ellis, 454.

Exch. of Pleas,
1838.

THOMAS
v.
CONNELL.

fact to which it related, I postponed the reception of such declaration, in a cause of *Craven v. Halliley*, tried by me at York, until after the fact was proved. And this I think would be the correct course in all cases of the sort. But, taking the declarations in conjunction with the other evidence, as we now must, it cannot be said to be inadmissible.

BOLLAND, B., concurred.

GURNEY, B.—It is perfectly clear, that at a later stage of the cause at least, this would have been good evidence. Then, if coupled with the acts that were afterwards proved, it is clearly evidence that the party knew of his then state of insolvency.

Rule discharged.

SCARFE v. MORGAN.

S. sent a mare to M., a farmer, to be covered by a stallion belonging to him. The mare was taken to M.'s stables and covered accordingly, upon a Sunday. The charge for covering not being paid, M. detained the mare. A demand of her was afterwards made, but M.

TROVER for a mare. Pleas, first, not guilty; secondly, that the mare was not the property of the plaintiff. At the trial before *Parke*, B., at the last Assizes for the county of Suffolk, it appeared that the mare in question had been sent on more than one occasion to the premises of the defendant, who was a farmer, to be covered by a stallion belonging to him, and the charge of 11s. for the last occasion not having been paid, the defendant refused on demand to deliver up the mare, claiming a lien not only for the 11s., but for a further sum amounting alto-

refused to deliver her, claiming a lien not only for the charge on that occasion, but for a general balance due to him on another account:—*Held*, first, that M. was entitled to a specific lien on the mare for the charge for covering her:

Secondly, that the claim made by M. to retain the mare for the general balance was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum.

Thirdly, that such a contract was not void within 29 Car. 2, c. 7, s. 1, on the ground of its having been made and executed on a Sunday, it not being made by M. in the exercise of his ordinary calling; but that even if it were, the contract having been executed, the lien attached.

gether to 9*l.* 7*s.* 4½*d.*, for covering other mares belonging to the plaintiff, and including also a small sum for poor-rates; on which demand and refusal, the plaintiff, without making any tender of the 1*l.*s., brought the present action. It also appeared in evidence that the contract in question was made and executed on a Sunday. The learned Judge, on these facts being proved, directed the jury to find a verdict for the plaintiff for 25*l.*, the value of the mare, giving liberty to the defendant to move to enter a nonsuit on the three following points, which were raised at the trial:—First, whether this was a case in which any lien would exist at all; secondly, if it could, whether the defendant had waived his lien for this particular charge by insisting on payment of his whole demand; and thirdly, whether this contract, being made and executed on a Sunday, was void by the statute 29 Car. 2, c. 7. *Byles* having, in Easter Term, obtained a rule nisi accordingly,

Exch. of Pleas,
1838.

SCARFE

v.

MORGAN.

Kelly and Gunning shewed cause.—Even admitting, for the sake of argument, that a lien did exist in this case, the defendant, by claiming to detain the mare for the whole balance due, has lost his lien, and waived his right to a tender of the smaller sum in respect of which a lien could be supported. Where a party claims to retain goods, because he insists on payment of a larger sum than is due, or on a different ground from that of lien, no tender is necessary; by so doing he dispenses with the necessity of a tender. In *Boardman v. Sill* (a), which was trover for some brandy which lay in the defendant's cellar, and which, when demanded, he had refused to deliver up, saying *it was his own property*; and it appeared that at that time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made; Lord *Ellenborough* was of opinion that, as the brandy had been

(a) 1 Campb. 410, n.

Exch. of Pleas,
1838.

SCARLE

^{r.}
MORGAN.

detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien. So, in *Knight v. Harrison* (a), where the plaintiff brought trover for 100 pieces of calico; it appeared that the defendant was a commission agent at Manchester, and bought, as agent of Moravia & Co., London, of the plaintiffs at Manchester, 1,500 pieces of calico, to be paid for by a bill drawn by the plaintiff on Moravia & Co. These were delivered to the defendant on the 2nd of October; on the 4th of October, Moravia & Co. stopped payment; the plaintiffs applied to the defendant for the goods then in his hands, and the defendant, at first, promised to return them, they not having been drawn for, but he afterwards said he would not deliver them, as it was doubtful whether he could safely do so. The plaintiffs obtained an order on Moravia & Co., and shewed the order to the defendant, on which he said he would not give up the goods until Moravia & Co. *had paid his general balance*, the amount of which he did not state. The plaintiffs demanded the goods and tendered an indemnity, but the defendant refused to accept it. It was contended for the defendant, first, that he had a general lien for his whole balance; secondly, that he had a lien for 49% the amount of expenses incurred by him in getting the goods glazed: but *Abbott, C. J.*, said—"He has no lien for his general balance as against the plaintiff, as, at the time of the demand, he insisted on having his general balance, and did not name his particular lien, but made too large a claim: he is precluded from setting it up now, for if he had relied upon that now, it is most probable the plaintiff would have paid it; and as I have no doubt, I will not reserve the point." That reasoning is most satisfactory; for had the bailee claimed only the sum really due, the bailor might have paid

(a) MS. case in K. B. 10 Dec. 1823, reported in *Saunders on Plead. and Evid.* 641.

it. [*Parke, B.*—Must you not make it out that this amounted to a waiver of the lien? On the plea of not possessed, according to the decision of the Court of Common Pleas in *Owen v. Knight* (a), the right of lien being shewn, the defendant is entitled to hold possession till he has been repaid the amount of his lien, and he does not waive his lien by omitting to mention it. Here the sum demanded includes the 11s., in respect of which he had a lien on the mare. How do you make it out that he means to waive the tender of that sum? *Alderson, B.*—Suppose I claim a lien for sum A and sum B, and refuse to give up the chattel till you pay both those sums, and you are willing to pay me sum A but not sum B, do I waive the tender of sum A? A demand in an action, of 20*l.*, does not dispense with a tender of 10*l.*; then why should this demand of the whole balance of 9*l.* 7*s.* 4½*d.* dispense with the necessity of tendering the smaller sum of 11*s.*?] The case of *Ayling v. Williams* (b) shews that it is not necessary to tender the smaller sum. [*Alderson, B.*—That case is no authority: all that the learned Judge there says is, that if the case had turned on the question of tender, he would have given the defendant liberty to move. *Bolland, B.*—This question was a good deal discussed in the case of *Green v. Farmer* (c).] The cases shew that where a party insists on a lien on a particular ground, he must stand or fall by the mode in which he claims it; and unless he can support his right to the full extent which he has set up, he loses his right to do so. [*Alderson, B.*—It is easy to say that there is a general course of decisions, but you cite only two cases, which are distinguishable.] The question is not whether it is a waiver of the lien, but a waiver of the tender of the smaller sum. Unless the defendant establishes a right of detainer for the sum of 9*l.* 7*s.* 4½*d.*, he dispenses with

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

(a) 4 Bing. N. C. 54; 5 Scott, 307.

(b) 5 Car. & P. 399.

(c) 4 Burr. 2214.

Exch. of Pleas,
1838.

SCARFE

v.
MORGAN.

the tender of the sum of 11s. due for the covering on that particular occasion.

Then, secondly, this contract was void, because made and executed on a Sunday, it being in the ordinary calling of the defendant, within the statute 29 Car. 2, c. 7, s. 1. That statute enacts, "that no tradesman, artificer, workman, labourer, or other person shall do or exercise any work by labour, business, or work of their ordinary callings upon the Lord's day or any part thereof." The defendant was gaining a livelihood partly by this means. The using the horse in this manner, and sending him round the country for the purpose, is quite as much within the statute as the trade of a horse-dealer or a carrier. Here the defendant states on the printed card which he circulates, that the horse will be at home on Sundays. In *Ex parte Middleton (a)*, the driver of a van, travelling to and from London and York, was held to be a carrier within the meaning of the statute 3 Car. 1, c. 4, and liable to be convicted in the penalty of 20s. for travelling on the Lord's day. The act has always received a liberal construction, being for the better observance of the Lord's day. [*Parke, B.*—This is an executed contract; if it had been an executory contract it might be otherwise; I do not say it is so; but where a contract is executed, then the property passes.] Lastly, with respect to the general question of lien. There are no direct authorities to shew that a lien exists under such circumstances; and as actions for services like the present have been brought from time immemorial, and precedents of declarations in such actions are to be found in all the books of pleading, it is a strong argument against the existence of such a right, that no cases of lien are to be found. It is a principle in the doctrine of lien, that the party must have a right to retain possession of the thing on

(a) 3 B. & Cr. 164.

which the lien is to arise ; and for that reason it is that a livery stable keeper has no lien ; *Judson v. Etheridge* (a) ; because in that case it is of the essence of the contract that the bailor is to have possession of the horse whenever he requires it. In the present case, it appears from the defendant's card, that the horse was advertised to attend during the season at particular places, on certain specified days ; and if the groom had a right to detain the mares when the stipulated fees had not been paid, it would be most inconvenient, as he must take them along with him. [Parke, B.—There is one difficulty which occurs to us, which is this, if there be a lien, who is to feed the animal whilst it continues ? This differs from the case of a trainer or an innkeeper ; the former undertakes to feed the horse as part of the contract, and the claim of an innkeeper to a lien rests on a foundation peculiar to itself, viz. because he is bound to receive the guest and his horse. *Alderson*, B.—In a case like the present, it would be *damnosa hæreditas*, because the party would be obliged to keep the mare without being able to use her.] That creates another difficulty, for if there be a lien, there must be a right not only to detain the animal, but to insist on the amount of the keep during the time she is detained : but that can scarcely be contended. The case of *Bevan v. Waters* (b), where Best, C. J. held that a trainer had a lien on a race-horse for his charge in keeping and training him, may be relied upon by the defendant, but that, it must be observed, was only a *nisi prius* decision, and was put upon the ground, that where the bailee has expended labour and skill in the improvement of the subject delivered to him, he has a lien for his charge. A training groom expends his personal labour and time in the improvement of the animal delivered to him, but it may be doubted whether even he has a lien ; *Jacobs v. Latour* (c). In the present case, no

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

(a) 1 C & M. 743 ; 3 Tyrw. 954.

(b) Mo. & M. 235.

(c) 5 Bing. 130 ; 2 M. & Payne, 201.

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

labour is necessarily expended on the part of the defendant, and it is not necessary that the animal should be delivered into the defendant's possession; and a lien only arises where possession is to be given. It was here only accidental that the mare was sent to the defendant's stable, because the horse was at home on a Sunday. [*Alderson, B.*—It may be very doubtful whether the trainer would not be considered to be in the situation of the livery stable keeper, if by the contract he is to allow the owner to run the horse.] It seems to be doubtful whether a farrier has a lien on a horse for shoeing him: it is so said *arguendo* in *Muspratt v. Gregory* (a), but in *Rushforth v. Hadfield* (b), Lord *Ellenborough*, in speaking of liens, says, “growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments upon the common law. If they are encouraged, the practice will be extending to other traders and other matters. *The farrier will be claiming a lien upon a horse sent to him to be shod.* Carriages and other things which require frequent repair will be detained on the same claim; and there is no saying where it is to stop. It is not for the convenience of the public, that these liens should be extended further than they are already established by law.”

Byles and *O'Malley*, *contra*, were directed by the Court to confine themselves to the last point, as to the lien.—Although there is no decision to be found in point on this particular subject, yet there are many cases analogous, the principle of which is applicable to the present. In the case of *The Hostler* (c), it is said that the innkeeper is not bound to deliver the horse till the owner has defrayed the charge for his horse, nor the tailor until he is paid for the making of a coat. In *Bevan v. Waters*, it was held that the trainer of a race-horse had a lien. What was said by Lord *Ellenborough* in *Rushforth v. Hadfield* cannot be

(a) 1 M. & W. 641.

(b) 7 East, 224.

(c) Yelv. 67.

taken to be law. His observations are only dicta at most, and he there ridicules the idea of a person who repairs a carriage claiming a lien for so doing, although it is well established that such a claim can be sustained. In a case tried before *Parke, B.*, at Guildhall, where there was a claim of lien in respect of repairs done to a carriage, some of which had been ordered and some not; it was objected, that as the party had set up an undivided claim for both, instead of severing them, he had thereby lost his right; but the learned Judge held otherwise; and though the point was reserved, no motion was afterwards made upon it. [*Parke, B.*—I have referred to my notes, and find that the point did arise, and was disposed of as stated. The name of the case was *Green v. Shewell*.] In *Kirkman v. Shawcross (a)*, Lord *Kenyon* says:—"In every case that has occurred, and in which the question of liens has arisen, it has been the universal wish of the courts at all times to extend the lien as far as possible. In those which came before Lord *Mansfield*, he thought that justice required it; but he sometimes found that the rules of law were against it, and therefore he submitted, because in those cases the rigid rules of law were against the lien." In *Jacobs v. Latour (b)*, *Best, C. J.*, says: "As between debtor and creditor, the doctrine of lien is so equitable that it cannot be favoured too much." In *Chase v. Westmore (c)*, the principle was laid down that wherever value is communicated to a chattel by the labour of the party to whose possession it is entrusted for that purpose, a lien is thereby created. The doctrine till then had been that no lien existed where a specific price was agreed upon for the work to be done, but all the authorities which had previously sustained that position were there overruled. If any value is communicated, it is unimportant that it was not through any immediate application of skill or labour to the chattel (though

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

(a) 6 T. R. 17.

(b) 5 Bing. 132.

(c) 5 M. & Selw. 180.

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

even that was not wanting in the present case), for instances may be cited where a lien has been held to exist though no work is done upon the chattel, as in the case of warehouse room: *The King v. Humphery* (a): and so it is in the case of wharfage (b). Those cases depend on the principle that where value is communicated to an article a lien is created. In the case of the wharfinger, there is no act of labour. [*Alderson, B.*—How do you say that value is communicated in the case of the wharfinger? The chattel does not become more valuable, *ubicunque sit*. The case of a wharfinger proves too much—that is the case of a general lien. It is quite clear that the increase of value would not give the party a general lien. A lien may be created by contract, and it may arise either out of an express contract, or a contract by the custom of the trade.] In the case of a wharfinger, the article is more valuable for being landed by means of the wharf; on the same principle that goods coming from abroad, or from a distance, are more valuable for being imported or carried; and the general lien which wharfingers have includes a particular lien. But, independently of the mere communication of value, there was, in the present case, a positive application of skill and labour. Perhaps the decision in *Chapman v. Allen* (c), that an agistor has no lien, may be considered as an authority against the defendant; but that was an extrajudicial decision, and may have proceeded on the ground that the price was fixed; and whatever pretext there may formerly have been for such a doctrine, it was overruled in *Chase v. Westmore*. *Chapman v. Allen* may also perhaps be supported on the ground that a lien on the milch kine there sent to agist, would have been inconsistent with the object of the bailment. There is no other authority to shew that there can be no lien for agistment; and whenever that question arises, it will probably be found that there may be. Then a difficulty was suggested as to the feeding of the mare

(a) M'Clel. & Y. 673.

(b) Ib.

(c) Cro. Car. 271.

during the time she is detained; but that is nothing more than applies to the case of any other chattel, for the bailee is bound to take care of it whilst in his custody. The bailee must feed the mare at his own expense; and that may account for claims of this description not being usually made. The feeding of the animal is analogous to the preservation of any other chattel detained under similar circumstances; as in the case of corn, the bailee is bound to protect it from injury from the weather, or from perishing or deteriorating from other causes. So in a case which strongly resembles the present, of a horse being taken damage feasant and put into a pound covert, the distrainor is bound to feed him whilst there at his own expense and without satisfaction for it, (Co. Lit. 47. b.), though at common law it is otherwise in a pound overt (a).

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

PARKE, B.—With respect to the principal point in this case, (which has been very well argued on both sides,) as to the right of lien on a mare for the expense of covering, we will take time to consider our judgment; but, assuming that there was a lien, the Court have no difficulty as to the other two points. As to the first point argued by Mr. Kelly, the Court are unanimous in considering that if the defendant had a lien, he did not waive it under the circumstances of this case, by claiming to hold the mare not merely for the expense of covering her, but also for the expense of covering other mares belonging to the same plaintiff, and also for some payments made in respect of poor-rates which he had against him. The only way in which such a proposition could be established, would be to shew that the defendant had agreed to waive the lien, or that he had agreed to waive the necessity of a tender of the minor sum claimed to be due. Looking at the mode in which he made the claim, and at the ground on which he considered it to be made, I think it is clear he has not waived the lien, or excused the necessity of making a ten-

(a) But this is now altered by stat. 5 & 6 Will. 4, c. 59, ss. 5 and 6.

Exch. of Pleas,
1838.

SCARFE

v.
MORGAN.

der ; for when the demand was made, he said, " I have a general account with you, on which a balance is due to me of so much," and part of it was, particularly, a charge of 11s. for covering this mare. The cases referred to by Mr. *Kelly* seem to be distinguishable from the present. In the case of *Boardman v. Sill*, the defendant did not mention his lien at all, but claimed to hold the goods on the ground of a right of property in them, and did not set up any claim of lien at all. In *Knight v. Harrison*, the ground of refusal was, that the right of property was in another person as to the goods in question, and that he had a general lien for expenses on those goods. Neither of those two cases appears to me to apply to the present. In this case it would be strange to say that the defendant meant to waive his lien of the 11s., when that was one of the things he said he would hold the mare for, and it would be equally strange to say that he meant to excuse the tender of that sum, when no tender was made of any sum at all. I do not mean to say that such circumstances may not occur as would amount to the waiver of a lien, and of the tender, but that a great deal more must have passed than was proved to have passed on the present occasion. If he had said, " You need not trouble yourself to make a tender of the sum for which I have a lien, and I shall claim to hold the mare for it," the plaintiff would then be in the same situation as if a tender had been made ; but we think the defendant cannot be deprived of his right of holding the property on which he had a lien, by any thing that has passed on the present occasion. Then, as to the other objection, that this was an illegal contract, on the ground of its having been made on a Sunday ; we are of opinion that this is not a case within the statute 20 Car. 2, c. 7, which only had in its contemplation the case of persons exercising trades, &c. on that day, and not one like the present, where the defendant, in the ordinary calling of a farmer, happens to be in possession of a stal-

lien occasionally covering mares: that does not appear to me to be exercising any trade, or to be the case of a person practising his ordinary calling. But independently of that consideration, this is not the case of an *executory* contract; both parties were in *pari delicto*—it is one which has been executed, and the consideration given; and although in the former case the law would not assist one to recover against the other, yet if the contract is executed, and a property either special or general has passed thereby, the property must remain; and on that ground also, this lien would be supported, though it were or might have been illegal to have performed this operation on a Sunday. It seems to me, however, that it was not so: there is nothing like a trade, and no direct dealing on a Sunday. The only point, therefore, now to be determined, is, whether the defendant had any lien at all of this description; and upon that we will take time to consider.

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

BOLLAND, B.—I am of the same opinion in this case as my Brother *Parke*, as to these two points; and I confess I have a very strong opinion in favour of the defendant on the other.

ALDERSON, B.—Upon the two points on which the Court has given judgment, I entirely concur. It seems to me a monstrous proposition, to say that a party who claims in respect of two sums to detain a mare, is to be supposed to have waived his right to detain her as to one. The more natural conclusion is, that the defendant intended to act upon both; if so, and if the other party is informed of that, it then became his duty to consider whether he would tender one or the other; and with respect to the observation that has been cited as having fallen from Lord *Tenterden*, that if the defendant had given notice, the plaintiff would have paid, an equally strong observation appears to arise the other way; for probably had the plaintiff said, “I tender you this sum, which I admit I am bound to pay,” it might

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

cause the defendant to reflect whether he really had a right to detain the mare as to the other. It seems to me you cannot say, that because the party claims more than, it may be ultimately found he had a right to, he would not have a right to a tender of the sum which the other ought to pay.

GURNEY, B., concurred.

Cur. adv. vult.

The judgment of the Court on the principal point was delivered in this term by—

PARKE, B.—The Court have already disposed of two questions argued in this case. The first, whether the defendant's lien on the plaintiff's mare, if it existed, was waived by a claim to retain her, not merely for the amount due on the particular occasion, but also on others, as well as for a debt of a different kind. The second, whether the circumstance, that the transaction occurred on a Sunday, rendered the lien invalid. We expressed our opinion on the first point, that there was no waiver of the lien, nor any dispensation with the tender of the amount due on that occasion; and on the second, that this was not a transaction in the course of the ordinary calling of the defendant: and if it was, that still the lien would exist, because the contract was executed, and the special property had passed by the delivery of the mare to the defendant, and the maxim would apply, *in pari delicto potior est conditio possidentis*.

The only remaining question, upon which the Court reserved its opinion, is, whether the defendant is entitled to a specific lien on the animal the subject of the action. The jury have found that it was delivered into his possession for the purpose mentioned; that the sum is still due; and that the mare remained in the defendant's possession after the claim had arisen and was due.

The case is new in its circumstances, but must be

governed by these general principles which are to be collected from the other cases in our books.

Exch. of Pleas,
1838.

The principle seems to be well laid down in *Bevan v. Waters*, by Lord Chief Justice *Best*, that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form; or the farrier by whose skill the animal is cured of a disease; or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases.

SCARFE
v.
MORGAN.

This, then, being the principle, let us see whether this case falls within it; and we think it does. The object is that the mare may be made more valuable by proving in foal. She is delivered to the defendant, that she may by his skill and labour, and the use of his stallion for that object, be made so; and we think, therefore, that it is a case which falls within the principle of those cited in argument.

But there is another difficulty which, unless answered, would prevent the lien from taking effect. It is clear that, even in such cases, if the nature of the contract applicable to such skill or labour be inconsistent with the lien, that the latter, which is but a stipulation annexed impliedly to the contract, cannot exist. Prior to the case of *Chuse v. Westmore*, the general opinion had been that there could be no lien where there was any express contract at all. That case, however, decided, that where there was an express contract, but containing no stipulation inconsistent with the lien, it might still exist. In the case of the livery

(a) 5 Bing. 131.

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

stable keeper there is such an inconsistency, because, by the nature of the contract itself, the possession is to be redelivered to the owner whenever he may require it. In fact, that falls within the principle of the time of payment being, by the contract itself, postponed to a period after the redelivery of the chattel. The doubt as to the case of the trainer, in *Jacobs v. Latour* (a), turns on this. There the question is, whether in the contract for training, there is a stipulation for the redelivery of the horse trained for the purpose of racing. So, again, if a time be fixed for the payment—for there the lien is inconsistent with the right of intermediate redelivery.

This case, however, presents no such difficulty—there does not appear here any such inconsistency. The mare is delivered for the purpose of being covered, and for a specific price to be paid for it. In this there is nothing inconsistent with the implied condition that the defendant shall detain her till payment. And on the contrary, according to *Couper v. Andrews* (a), cited in *Chase v. Westmore*, the word “for” works by condition precedent in all personal contracts, as, if I sell you my horse *for* ten pounds, you shall not take my horse except you pay the ten pounds.

So that, in this case, the lien is more consistent with this contract than the denial of it.

It occurred to us in the course of the discussion, which was very ably conducted on both sides, that there was a difficulty arising out of the circumstance that this being a living chattel, might become expensive to the detainer, and that the allowance of such a lien would raise questions as to who was liable to feed it intermediately. But Mr. *Byles* answered this difficulty satisfactorily, by referring us to the analogous case of a distress kept in a pound covert, where he who distrains is compellable to take

(a) Hob. 41.

reasonable care of the chattel distrained, whether living or inanimate, and to the case of a lien upon corn, which requires some labour and expense in the proper custody of it.

Exch. of Pleas,
1838.

SCARFE
v.
MORGAN.

Other cases were cited in the argument, but they were cases of general lien, which clearly turn upon contract or usage of trade, in which he who seeks to establish such contract or usage *ultrà* the general law, is held to strict proof of the exception on which he relies. These are wholly distinguishable from this case.

Upon the whole, we think this lien exists, and judgment must be for the defendant.

Rule absolute to enter a nonsuit.

M'DONALD v. JOPLING.

ASSUMPSIT to recover 28*l.* 17*s.* 6*d.* for wages due for service on board a certain ship belonging to the defendants.

Pleas, first, the general issue : secondly, that the said service of the plaintiff in the declaration mentioned, was by him done and performed under and by virtue of a certain agreement in writing made, to wit, on the 14th of August, A. D. 1836, pursuant to the direction of an act of Parliament passed in the fifth and sixth years of the reign of his late Majesty King William the Fourth, being an act to amend and consolidate the laws relating to the merchant seamen of the united kingdom, and for forming and maintaining a register of all the seamen engaged in that service, between William Gladson, the master of the said ship in the declaration mentioned, being a ship called *Chrystal*, of the port of Newcastle, and of the burden of 264 tons, and the several persons whose names are subscribed to that agreement; and whereby it was

Where a seaman who has signed the articles of agreement required by 5 & 6 Will. 4, c. 19, absolutely quits the ship, without any animus revertendi, after her arrival and being moored at her port of delivery, but before her cargo has been discharged, he does not thereby incur a total forfeiture of his wages within the 9th section of that statute, but only of a month's wages under the 7th section.

Exch. of Pleas,
1838.

M'DONALD
v.
JOFLING.

agreed by and on the part of the said persons, and they severally thereby engaged to serve on board the said ship in their several capacities against their respective names expressed, in a voyage from the port of London to Cardiff and thence to the port of Palermo in Sicily, and back to the port of delivery in the united kingdom; and the said crew further engaged to conduct themselves in an orderly, faithful, honest, careful, and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful command of the said master in every thing relating to the said ship and the materials, stores, and cargo thereof, whether on board such ship, in boats, or on shore, and should not on any account or pretence whatever go out of or quit the said ship by day or night, without leave being first obtained of the master or commanding officer on board. In consideration of which services to be duly, honestly, carefully, and faithfully performed, the said master did thereby promise and agree to pay to the said crew by way of compensation or wages, the amount against their names respectively expressed; and in witness thereof the said parties thereunto subscribed their names on the days against their respective signatures mentioned, as by the said agreement, reference being thereto had, will more fully appear; and the defendant further says, that the said agreement specified what monthly or other wages such of the said seamen was to be paid, the capacity in which he was to act, and the nature of the voyage in which the said ship was intended to be employed; and the said agreement contained the day of the month and year in which the same was made, and the same was signed by the master in the first instance, and by the said seamen respectively at the port or place where such seamen were respectively shipped; and the said agreement was in the form, and contained true entries under their respective heads of the several particulars set forth, in the said schedule to the said statute annexed and

marked A, so far as the same could be ascertained; and the defendant further says, that the plaintiff, to wit, on the said 14th of August, in the year of our Lord 1836, subscribed and signed his name and became a party to the said agreement to serve on board the said ship in the said voyage, in the capacity of a mate, and that capacity was expressed against his name so subscribed as aforesaid, at the wages therein and thereby specified of 5*l.* for each and every calendar month; and the defendant further says, that after the making of the said agreement, to wit, on the 15th of September, in the year of our Lord 1836, the said ship left her first port of clearance, and sailed and proceeded on her said voyage in the said agreement mentioned; and that afterwards, and before the period for which the plaintiff so agreed to serve was completed, and *after the said ship's arrival at her port of delivery, and before her cargo had been discharged*, to wit, at the port of Liverpool, in the united kingdom, to wit, on the 4th of February, in the year of our Lord 1837, the plaintiff did, wilfully and without the leave and permission of the defendant or the said master, or other person in command of the said ship, and without any previous discharge, *absolutely desert the said ship* to which he so belonged as aforesaid, and the circumstances attending such desertion were then, at the time, entered in the log-book of the said ship, and certified by the signature of the said master, and the said desertion was then treated by the master of the said ship as an absolute one, whereby, and according to the said statute, he forfeited to the defendant, the owner of the said ship, his said wages or salary to which he might otherwise have been entitled; and the defendant further says, that the service of the plaintiff was not done otherwise than under and by virtue of the said agreement and in the said voyage: and this the defendant is ready to verify &c.

Esch. of Pleas,
1838.

M'DONALD
v.
JOPLING.

The third plea was pleaded only to the sum of 5*l.*,

Exch. of Pleas,
1838.

M'DONALD
v.
JOPLING.

parcel of the said sum of 28*l.* 17*s.* 8*d.*, and was in the same terms as the second, except that, instead of stating that the plaintiff absolutely deserted the ship, it alleged that "he did wilfully &c. quit the said ship to which he so belonged as aforesaid, and remained quit and absent therefrom for a long time, to wit, three days then next following," &c.—The plaintiff replied to the second plea, that he did not absolutely desert the said ship, in manner and form as in that plea alleged, on which issue was joined; and as to the 5*l.* to which the third plea was pleaded, he entered a *nolle prosequi*.

At the trial before *Coleridge, J.*, at the last assizes for Northumberland, the facts stated in the second plea having been proved on behalf of the defendant, a verdict was found for him on that issue. In Easter Term, *S. Temple* obtained a rule nisi to enter the judgment for the plaintiff non obstante veredicto, on the ground that the quitting of the ship by the plaintiff, as stated in the plea, after her arrival and before the discharge of the cargo, was not a *desertion* under sect. 9 of stat. 5 & 6 Will. 4, c. 19, which worked a total forfeiture of the wages, but was an offence contemplated by section 7, punishable by loss of one month's wages only.

W. H. Watson shewed cause in this term.—The plaintiff has forfeited his right to wages, as well by the express provisions of the stat. 5 & 6 Will. 4, c. 19, as by the maritime law in general; because a forfeiture of wages is the necessary consequence of desertion of a ship by a mariner. The 7th section of that act provides, "That if any seaman, after having signed such agreement as aforesaid, or after the ship on board which he shall have agreed to serve shall have left her first port of clearance, and before the period for which he shall have agreed to serve shall be completed shall wilfully and without leave absent himself from the ship or otherwise from his duty, he shall (in all cases n

of absolute desertion, or not treated as such by the master), forfeit out of his wages, to the master or owner, the amount of two days' pay for every twenty-four hours of such absence, and in a like proportion for every less period of time, or, at the option of the said master, the amount of such expenses as shall have been necessarily incurred in hiring a substitute to perform his work; and in case any seaman, while he shall belong to the ship, shall, without sufficient cause, neglect to perform such his duty as shall be reasonably required of him by the master, or other person in command of the ship, he shall be subject to a like forfeiture in respect of every such offence, and of every twenty-four hours' continuance thereof; and in case any such seaman, after having signed such agreement, or after the ship's arrival at her port of delivery and before her cargo shall be discharged, shall *quit* the ship, without a previous discharge or leave from the master thereof, he shall forfeit to the master or owner one month's pay out of his wages." Then comes the 9th section, which enacts, that "Every seaman who shall *absolutely desert* the ship to which he shall belong, shall forfeit to the owner or master thereof all his clothes and effects which he may leave on board, and all wages and emoluments to which he might otherwise be entitled, provided the circumstances attending such desertion be entered in the log-book at the time, and certified by the signature of the master and mate, or other credible witness; and that an absence of a seaman from the ship for any time within the space of twenty-four hours immediately preceding the sailing of the ship, without permission from the master thereof, or for any period, however short, under circumstances plainly shewing that it was his intention not to return thereto, shall be deemed an absolute desertion; and in case such desertion shall take place in parts beyond the seas, and the master of the ship shall be under the necessity of engaging any seaman as a substitute for the deserter, at a higher rate

Exch. of Pleas,
1838.

M'DONALD
v.
JOPLING.

Exch. of Pleas,
1838.

M'DONALD
v.
JOPLING.

of wages than that stipulated in the agreement to be paid to the seaman deserting, the owner or master of the ship shall be entitled to recover from the deserter by summary proceeding, in the same manner as wages are by this act made recoverable, any excess of wages which such owner or master shall pay to such substitute beyond the amount which would have been payable to the deserter in case he had duly performed his service pursuant to his agreement." It is obvious that the punishments for the minor offence of neglecting duty, or leaving the ship, contemplated by the 7th section, are totally independent of the 9th section, which points to the case of forfeiture for an absolute desertion, and goes on to say what shall be deemed an absolute desertion, namely, leaving the ship for however short a time, after signing the agreement, without any intention of returning; providing that in such a case the mariner shall forfeit all his wages to which he would otherwise be entitled. It is clear that by the words "quit the ship," in the 7th section, and the word "desert," in the 9th, the legislature meant totally different things; in the former, quitting for a mere temporary purpose, and in the latter, quitting it without any intention of returning; it is equally clear that in this case the defendant had no *animus revertendi* at the time he left the ship; and he has, therefore, forfeited all his right to wages. The 11th section, which provides for the time in which wages are to be paid, shews that the contract is to continue until after the cargo is delivered, or the seaman is discharged. The case of *Frontine v. Frost* (a) was cited when this rule was moved for, and perhaps it will now be relied upon; but that was a decision on the repealed statute 2 Geo. 2, c. 36, s. 3, the words of which are very different, and apply in terms to the case of a desertion of a vessel when in parts beyond the seas.—But, independent

(a) 3 Bos. & P. 302.

of the statute, on general principles of maritime law, this was a contract to serve on board this vessel for a specified time, during the continuance of her voyage and back to her port of delivery. The voyage is not considered at an end by the mooring of the vessel—the delivery of the cargo is necessary to be first completed; and for that purpose it is quite essential that the crew should be kept on board, as she may be ordered by the harbour-master from one dock to another, or to a different tier. In *Abbott on Shipping*, 463, it is said, “desertion from the ship is held to be a forfeiture of the wages previously earned, in all maritime states:” and the author cites the case of *The Pearl, Denton (a)*, where certain mariners hired in the Downs for a voyage or run to the port of Hull, at twelve guineas each, with the consent of the master, but against the positive order of the owners, quitted the ship on the day after her arrival in the roadstead of that port, in the river Humber, the port being so full that the vessel could not enter immediately; and the then learned judge of the Court of Admiralty decreed that the mariners had forfeited their wages. And he afterwards observes (b), “It is of great importance to understand that the forfeiture of wages for desertion does not arise out of the provisions of the legislature, but depends, as I have already intimated, upon a general rule and maxim of the maritime law.” According to that rule, then, the plaintiff, by abandoning the ship before the delivery of the cargo, has violated his contract, and forfeited his claim to wages.

Exch. of Pleas,
1838.

M'DONALD
v.
JOPLING.

S. Temple, contra.—The plea does not shew that the plaintiff has done that by which a forfeiture of all his wages was incurred. It states that after the ship's arrival at her port of delivery, and before her cargo had been discharged, the plaintiff did wilfully, without

(a) 5 Rob. Adm. Rep. 221.

(b) P. 468.

Exch. of Pleas,
1838.

M'DONALD
v.
JOPLING.

the leave of the defendant or the master of the ship, and without any previous discharge," absolutely desert the said ship. It states that the ship had arrived in her port of delivery, and does not shew that the voyage had not terminated. There are three cases contemplated by the statute. First, that of mere temporary absence; secondly, that of an absolute desertion during the voyage; thirdly, that of quitting the ship after her arrival in the port of delivery, but before the delivery of the cargo. This is the last case, and falls within the provision in the latter part of the 7th section,—“in case any such seaman, after the ship's arrival at her port of delivery and before her cargo shall be discharged, shall quit the ship, without a previous discharge or leave, he shall forfeit one month's pay out of his wages.” The use of different expressions in the statute shews that by “quitting” was meant something different from “desertion.” A desertion cannot be except during the continuance of the voyage, which is from the first port of clearance back to the port of delivery. There is also a distinction between a “quitting” and a mere temporary absence. “Quitting” can only mean a total quitting after the arrival of the vessel in her port of delivery, and before the cargo is discharged. That word was used in this section, because it was doubtful whether or not the contract was determined by the arrival of the ship in her port of delivery, and it was meant to obviate that difficulty. The preamble of the 6th section of 2 Geo. 2, c. 36, recites that “whereas seamen and mariners, after their arrival at their unlivering port in Great Britain, oftentimes leave the ships or vessels before they are unladen, or before the seamen and mariners are discharged by the masters of such vessels;” and it then goes on to provide a penalty for leaving the ship before they are discharged, viz. the forfeiture of one month's wages. The case of *The Pearl, Denton*, is in the plaintiff's favour, for the ground of the decision there was, that

the vessel was not at the end of her voyage, but entered her port of delivery afterwards. The 9th section is undoubtedly ambiguous, but it must be construed consistently with the 7th. The enactment in the 9th section, that "the absence of any seaman from the ship, for any time within the space of twenty-four hours immediately preceding the sailing of the ship, without permission, or for any period however short, under circumstances plainly shewing that it was his intention not to return thereto, shall be deemed an absolute desertion," shews that by *desertion* the statute intended absence from the ship without permission, either within twenty-four hours before sailing, or for some period, however short, during the continuance of the voyage, when the absence of any of the crew would be infinitely more prejudicial than after the arrival of the vessel in port; and it immediately goes on to provide for the case of a desertion in parts beyond the seas. [*Parke, B.*—You say that the 9th section contemplates two cases of desertion, either within twenty-four hours before sailing, or in parts beyond the seas, and before the ship arrives at her port of delivery.] Yes.

Exch. of Pleas,
1838.

M'DONALD
v.
JOPLING.

Cur. adv. vult.

On the following day, the judgment of the Court was delivered by

LORD ABINGER, C. B.—This was a motion for judgment non obstante veredicto, and the question turned upon the construction of the 5 & 6 Will. 4, c. 19, intituled, "An Act to amend and consolidate the laws relating to merchant seamen," &c. The action was indebitatus assumpsit for wages, and the second plea was as follows:—[His Lordship here stated the plea.] Upon the construction of the 9th section of this statute, it was contended on one side, that an absolute quitting of the ship by a mariner, without any intention of returning, at any period before the final

Exch. of Pleas,
1838.

M'DONALD
v.
JOPLING.

delivery of the cargo, incurred a forfeiture of all his wages; on the other hand, it was argued that this clause, with reference to others, only contemplated the case of desertion either before sailing, or during the stay of the vessel in foreign parts, but not a desertion after the arrival at the place of destination; and reference was made to the 7th section, where a particular kind of desertion is specially provided for. [His Lordship read the 7th section.] This clause expressly provides for the case of quitting the ship under circumstances like the present, and imposes the penalty of the loss of a month's wages; and although the plea makes use of the term "desertion," to describe the case provided for by the 9th section, it is our duty to construe the act so as not to defeat the provision which appears to be made in the 7th section for the case in question, if we can put such a construction upon it as will render the two clauses consistent; and in order to do so, the 9th section may be considered as applying to the case of the desertion of a ship whilst in foreign parts, and before her arrival at her port of delivery; and the 7th section as applying to the quitting of a ship after her arrival in her port of delivery, but before the discharge of her cargo. This is the construction which is sought to be put on this act by the plaintiff's counsel, and which we think the more reasonable; and consequently, although the plaintiff has forfeited a month's wages by quitting the vessel in the manner stated, the balance he is still entitled to, and judgment non obstante veredicto must be entered for the amount. It is a case of considerable importance, and the point being upon the record, the party may bring a writ of error if he is dissatisfied with our judgment.

Rule absolute.

Each. of Pleas,
1838.

CHANTER v. LEESE, CUSSONS, and DIGGLE.

ASSUMPSIT.—The declaration stated, that by a certain memorandum of agreement, made the 25th day of February, 1836, between the plaintiff of the one part, and the defendants of the other part; reciting, that by a certain agreement bearing date the 6th day of September, 1833, between the plaintiff and the defendant George Cussons, the plaintiff did agree with the said defendant George Cussons for the sale of Wittey's Patent Furnace, such patent being then vested in the plaintiff, in a certain district therein specified; and also that the plaintiff had since obtained his Majesty's letters patent for an improvement in furnaces, and the plaintiff and John M'Curdy had obtained a patent for an improvement in generating steam, and the plaintiff and John Ingledew a patent for a metallic wheel and revolving axle; and that the plaintiff was also solely interested in a patent for a new mode of abstracting heat from steam, vapour, or other fluids; and that the plaintiff and John Gray had obtained a patent for an

By agreement, not under seal, between the plaintiff and A., B., and C., of the one part, and the defendants, of the other part, reciting that the plaintiff had obtained a patent for an improvement in furnaces, and was solely interested in another patent invention; that the plaintiff and A. had obtained a patent for another invention, the plaintiff and B., for another, and the plaintiff and C., for another; it was agreed between the said parties, that, for

the considerations therein mentioned, it should be lawful for the defendants exclusively to use, manufacture, and sell any or all of the said patent inventions, within certain limits, during the continuance of the several patents, on certain terms, viz. that an office and warehouse should be prepared for the sale of articles connected with the inventions, and that books of account of the sale of each of the inventions should be kept there by the defendants, and be open at all times to the inspection of the parties thereto of the first part; that the defendants should pay to the plaintiff 400*l.* a-year as a consideration for the license for the sale, &c., of all the aforesaid patent, and that such sum should be charged as a payment by the defendants in their books of account; that they should pay A. a certain rateable sum on all machines used, &c., on his patent principle; that they should also pay the plaintiff a moiety of the net profit to arise from all the said inventions (except those in which B. and C. were interested); to the plaintiff and B. two-thirds of the net profit to arise from theirs; and to the plaintiff and C. two-thirds of the net profit to arise from theirs: and it was agreed that either of the parties might determine the agreement at the end of five, seven, or ten years. In an action on this agreement, by the plaintiff alone, to recover a half yearly payment of the 400*l.*, the defendants set out the plaintiff's patent for the improvement in furnaces, and pleaded that it was not at the time of the grant a new invention as to the public use thereof in England, whereby the grant was void, which the plaintiff, at the time of the making of the agreement, well knew:—*Held*, on demurrer, that the plea was a bar to the action. *Held*, also, that the declaration was bad on the ground of variance, as it stated the agreement to be made between the plaintiff and defendants, whereas there were other parties to it of the first part besides the plaintiff. *Seemable*, that the action ought to have been jointly brought by all the parties to the agreement of the first part.

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

improved furnace applicable to locomotive engines : it was thereby agreed between the said parties, that for the considerations therein mentioned, it should be lawful for them the defendants exclusively to use, manufacture, sell, and dispose of any or all the aforesaid patent inventions within the whole of the county of Lancaster, (except the town and parish of Liverpool and a circuit of ten miles therefrom), and also within such part of the county of Chester as were within ten miles of Manchester Exchange, and not elsewhere, during the continuance of the said several letters patent respectively, subject to determination as thereafter mentioned, on certain terms, (that is to say) : that an office and warehouse at Manchester aforesaid, for the sale and disposal of stoves, pipes, and all articles connected with the aforesaid patents, should be immediately prepared by the defendants, and that books of account of the sale of each of the said inventions should be kept by the defendants, and that such books should be open at all times, at such office in Manchester, for the inspection of the said parties thereto of the first part ; that the defendants should pay to the plaintiff the sum of 400*l.* per annum, during the existence of the said agreement, by half-yearly payments, on the 20th day of December and the 20th day of June in every year, the first payment to be made on the 20th day of June then next ensuing, as a consideration for the aforesaid license for the sale, use, and manufacture of all the aforesaid patents, and for the power of granting licenses to other persons for the same purpose, in the aforesaid district : and it was further agreed, that the aforesaid half-yearly payments to the plaintiff should be charged as a payment by the defendants in their books of account : and that the defendants should also pay to the said John M'Curdy the sum of five shillings per horsepower for all boilers or steam generators on Mr. M'Curdy's patent principle, which should be used, manufactured, sold, or erected by them, being the said John M'Curdy's

proportion of profit of the said patent boiler or steam generator, calculating ten superficial feet of surface per horse-power, and on all boilers not applied to steam engines, the sum of five per cent. on the manufacturer's charge for such boilers; and that such last-mentioned payments should be charged as such in the books of account; and the defendants should also, as a consideration for the aforesaid license, pay to the plaintiff one moiety of the net profits after the payments aforesaid, and all other payments and expenses, to arise from Wittey's patent furnace and Chanter's improved furnace, and from Chanter's and Wittey's patent for abstracting heat from vapour and other fluids, and from M'Curdy's boiler; and to the said plaintiff and John Ingledew two-thirds of such net profit to arise from the sale of Ingledew's patent wheel and revolving axle; and to the said plaintiff and John Gray, two-thirds of such net profits to arise from Chanter and Gray's recent patent furnace applicable to locomotive boilers: and it was further agreed, that if the said parties thereto, or either of them, should be desirous to put an end to the said agreement, they should be at liberty so to do, at the expiration of five, seven, or ten years from the date thereof, by giving unto the other party six calendar months' previous notice in writing, and in that case the said agreement, from and after the expiration of such notice, should cease and be void. The declaration then averred mutual promises, and alleged as a breach the non-payment of 200*l.*, being a half-yearly payment of the said sum of 400*l.*, to be paid by the defendants to the plaintiff for the half year ending the 20th of June, 1837. There was also a count on an account stated.

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

Pleas, first, non assumpserunt: secondly, that the letters patent in and for the said supposed improvement in furnaces, in the first count of the declaration mentioned, were and are letters patent, bearing date at Westminster, the 2nd

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

day of September, in the 5th year of Will. 4, [the letters patent were then set forth at length]; and the defendants further say, that the said supposed improvement in furnaces in the first count and in the said letters patent mentioned, was not at the time of the petition in the said letters patent mentioned, or of the said royal grant, a new invention as to the public use and exercise thereof in England, contrary to the form and effect of the said letters patent, and of the statute in such case made and provided; whereby the said letters patent, at the time of the granting thereof, were and are void and of none effect; all which the plaintiff, before and at the time of the making of the said memorandum of agreement in the first count mentioned, well knew. Verification.—The defendants pleaded, thirdly, that the said letters patent for the said supposed improvement in furnaces in the first count mentioned, were and are the said letters patent in the last plea mentioned and described; and that the said supposed improvement in furnaces was not invented or found out by the plaintiff, as in the said letters patent mentioned, contrary &c.; whereby the said letters patent, at the time of the granting thereof, were and are void and of none effect; all which the plaintiff, before and at the time the making of the said memorandum of agreement on the first count mentioned, well knew.—Verification.

The plaintiff took issue on the first plea, and demurred specially to the second and third, assigning the same causes of demurrer to each; viz. that the plea contains matter which, if true, constituted an answer or defence to part only of the cause of action in the first count, in this, to wit, that the promise to the defendant in the first count was made in consideration of the right and liberty to use and vend the whole of the patent inventions in the said agreement in the first count mentioned and set forth; whereas the defendants in and by their plea attempt to avoid the agreement upon the allegation of matter which,

if true, tends to invalidate one only of the said patents, and therefore to avoid only part of the consideration for the promise of the defendants in the first count mentioned; and the plea does not shew or contain any matter in denial, or in confession and avoidance, of the residue of the cause of action, or consideration for the promise of the defendants in the first count mentioned; and that the issue tendered in the plea is immaterial.—Joinder in demurrer. The points of argument stated on the defendants' part were, that the objections taken by the plaintiff to the pleas are not well founded, and that the first count is bad, because it states an executory agreement only, and does not shew that the defendants enjoyed the license therein mentioned, or any other ground for claiming the payment therein mentioned.

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

The cause was taken down for trial, on the issue joined on the first plea, at the last Liverpool Assizes, before *Coleridge, J.* The agreement of the 25th of February, 1836, being put in, appeared to be substantially in the terms set forth in the declaration, excepting that the parties to it of the first part were the plaintiff, M'Curdy, Ingledew, and Gray, and not the plaintiff alone, as alleged in the declaration. It was accordingly objected for the defendants, first, that there was a variance by reason of the names of all the contracting parties not being set out in the declaration; and secondly, that the action ought to have been brought by the above-mentioned four persons jointly, instead of by the plaintiff alone. In order to obviate the former objection, the plaintiff's counsel applied to the learned judge to amend the record, so as to make the declaration correspond with the agreement, but this the learned judge was disinclined to do, as there was a demurrer upon the record. He afterwards directed the jury to find specially under the 24th section of 3 & 4 Will. 4, c. 42, that the agreement

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

put in was made by the defendants, in order that the plaintiff might apply to the Court under that statute.

In Easter term, a rule was obtained to shew cause why judgment should not be given to the plaintiff under the above statute; and the Court directed that this rule should come on for argument at the same time as the demurrer. In the present term, the whole case was accordingly argued by

Cleasby, for the plaintiff.—I. The special pleas constitute no answer in point of law to the declaration. First, they do not disclose any failure of consideration. All that is stated in the agreement in reference to the plaintiff's invention for the improvement of furnaces, is, that the plaintiff had obtained a patent for it; there is no warranty that this patent invention is a good one; and the principle of caveat emptor must apply. It is not disputed that all the letters patent have been duly obtained, and are subsisting as such, and have not been avoided. The defendants, therefore, have all they have contracted for, viz. the exclusive use of those patents within the limits agreed on. There is nothing stated in the pleas which is tantamount to an *eviction*. It is like a case between landlord and tenant, where the tenant, if he seeks to avoid the contract of demise, must shew, not only that the landlord had not what he professed to demise, but also that he, the tenant, has been evicted. The pleas do not shew any fraud: they allege, indeed, that the patent was void within the knowledge of the plaintiff, but they do not allege it as fraud, and non constat but that the defendants were also cognisant of the invalidity. In *Bowman v. Taylor* (a), the declaration stated, that by indenture, which recited that the plaintiff *had invented* certain improvements in the construction of looms, and had obtained letters patent for

(a) 2 A. & E. 278; 4 Nev. & M. 264.

such invention, and had agreed with the defendants to let them use the said invention for a part of the term granted by the letters patent, in consideration of certain covenants, &c., the plaintiff covenanted to permit the defendants to use and have the benefit of such invention and patent, and the defendants, in consideration of the grant, &c., covenanted to perform the agreement on their part; and assigned a breach for non-performance of such covenant. The defendants pleaded, as here, that the supposed invention in the declaration mentioned was not nor is a new invention, and that the plaintiff was not the first or true inventor of the improvements in the indenture mentioned. The Court held, on general demurrer, that the defendants were estopped by the recital in their deed from contradicting the fact that the plaintiff had invented the improvements, in the sense in which the deed alleged him to have done so; and that if the pleas were intended merely to allege that the plaintiff was not the sole inventor, or that the invention had been made long before the grant of the patent, they were no answer to the action. That case is not directly in point, because there the license was under seal, and there was an estoppel on the defendants by the recital of the deed; but the principle of the decision is applicable, the effect of it being, that the abstract right to the invention, or the novelty of it, does not come into question between parties in the situation of licensor and licensee. It is difficult to reconcile the case of *Bowman v. Taylor* with that of *Hayne v. Malby* (a), which, however, was supposed to have been distinguished from it in argument. That also was an action of covenant, on articles of agreement, which recited that the plaintiffs were the assignees of a patent machine, whereby they covenanted with the defendant that he should use it in a particular manner, in consideration of

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

(a) 3 T. R. 438.

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

which the defendant covenanted that he would not use any other: and it was held, that the defendant was not estopped by his covenant from pleading in bar of the action that the invention was not new, or that the patentee was not the inventor, and that therefore the patent was void. If that case were to be re-considered, the propriety of the decision might perhaps be questionable the judgments of Lord *Kenyon* and *Ashurst*, J., proceed on the ground of fraud upon the defendant, there being no plea alleging fraud: *Buller*, J. altogether excludes the question of fraud, and decides on the ground that the facts disclosed in the plea were equivalent to an *eviction*. But if the patent was void, the defendant would clearly be entitled to use the machine *in any way*; if, therefore, the plea shewed that the patent did not legally exist, he was remitted to his common law right of manufacturing any article he thought proper. *Taylor v. Hare* (a) more resembles the present case. There A, having obtained a patent for an invention of which he supposed himself to be the inventor, agreed to let B. use it on payment of a certain annual sum secured by bond: this sum was paid for several years, when B., discovering that the invention had been in public use before A. obtained his patent, brought an action for money had and received, to recover back the amount of the annuity paid: and it was held that he could not recover. *Heath*, J. says, "It might as well be said, that if a man lease land, and the lessee pay rent, and afterwards be evicted, he shall recover back the rent, although he has taken the fruits of the land." So here, it does not appear that the defendants have not received the fruits of their agreement—it does not appear that they have not *in fact* exclusively enjoyed the use of the invention, but only that they had no *right* exclusively to enjoy it.

(a) 1 N. R. 260.

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

But assuming this point to be against the plaintiff, the pleas at all events constitute no bar to this action, although the facts might form the ground of a cross action, or might go in mitigation of damages. This is the grant of a license to use six several patent inventions; and it must be taken that the plaintiff had a right to grant, and that the defendants had enjoyed, five of the six; supposing they had had no actual enjoyment of the sixth, that is no answer to an action on the agreement for the grant of all. In the case of an agreement or covenant to perform many things, the failure to perform one is no answer to an action against the other party for not doing that which *he* agreed or covenanted to do; see 1 Saund. 320, n. 4; (where the nature and effect of independent covenants is fully discussed); *Boon v. Eyre* (a). It does not appear here what is the relative value of the patents; and whatever may be the benefit derived from the other five, if this plea be a bar to the action, the whole of the annuity is to drop. The damages sustained by the parties would be altogether unequal, which was the argument applied in *Boon v. Eyre*. In *Ritchie v. Atkinson* (b) the same principle was acted on in assumpsit. There is perhaps some difference between that case and the present, because there the plaintiff was only to receive freight according to a stipulated rate *per ton* for the cargo loaded by him; but the principle established was the same—namely, that he could insist on the performance of the contract by the consignee, although he had not himself performed the whole of it, by delivering a complete cargo, and was liable to an action for not doing so. [Lord Abinger, C. B.—There the sum to be recovered apportioned itself, which is not the case here.] Lord Ellenborough rests his judgment on the principle established in *Boon v. Eyre*. *Havelock v. Geddes* (c), *Born-*

(a) 1 H. Bl. 273, note; 2 W. Bla. 1312.

(b) 10 East, 295.

(c) 10 East, 555.

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

mann v. Tooke (a), and *Rose v. Poulton* (b), are authorities to the same effect. In *Allen v. Cameron* (c), evidence of non-performance by the plaintiff of part of the contract on his part, was held admissible in reduction of damages, which assumes that it was no bar. If it be a bar, the plaintiff is not only deprived of the whole annuity, but loses the advantage of all the other beneficial clauses of the agreement. Again, it may be assumed that the other patents are good; but if this defence be a bar, it is a bar also to any action in respect of those other patents, because it avoids the agreement altogether. On the other hand, if it be not, the defendants are not injured, because they enjoy those which are valid, and have their remedy in respect of that which proves to be invalid.

II. The second question is, whether the action is properly brought by the plaintiff alone. Now as this agreement contains stipulations which are solely for the benefit of the plaintiff, and which must be taken to have been entered into in consideration of what *he* agreed, he only *could* sue for the breach of them. A covenant or agreement with several persons for the benefit of each, must be sued on severally. Thus, where there is a covenant with A. and B., to pay money to A., and to do something for the benefit of B., A. must sue for the money, and B. for the breach of contract. *Eccleston v. Clipsham* (d), *Brand v. Boulcott* (e), *Withers v. Bircham* (f), *Servante v. James* (g), are all authorities to shew that where the interest is several, the actions must be several, although the language of the covenant may be joint.

Cowling, contra.—First, the declaration is bad, as stating merely an executory agreement, and not shewing that

(a) 1 Camp. 377.

(b) 2 B. & Adol. 822.

(c) 1 C. & M. 832.

(d) 1 Saund. 153, and note.

(e) 3 Bos. & P. 235.

(f) 3 B. & Cr. 254; 5 D. & R. 106.

(g) 10 B. & Cr. 410.

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

it has been performed by the plaintiff, or that the defendants have had the benefit of it, or that he is ready and willing to give it them. The defendants, by the terms of the agreement, were to have the exclusive right of using and vending, not merely the plaintiff's own invention, but also others in which the plaintiff had only a partial interest: and there is no averment in the declaration that the defendants have or might have enjoyed those rights. This agreement would not convey a license, for that could only be granted under seal; but would be a mere agreement revocable at pleasure; and in an action by the plaintiff for the infringement of it, the defendants could only plead payment of the annuities by way of accord and satisfaction, not as an answer to the infringement. In *Hayne v. Maltby*, and *Bowman v. Taylor* (which were both cases of a grant of license by deed), it was expressly averred that the defendant had enjoyed the patent right which was the subject of the agreement. The whole argument on the other side rests on the ground that the defendants have been enjoying the other five patents, whereas nothing of the kind is averred in the declaration, but only that the annuity became due during the existence of the agreement; the whole amount of that allegation is, that there had been no notice to put an end to the agreement. It may be admitted that there would have been a quasi estoppel, if the defendants had enjoyed the patent rights; but that ought to have distinctly appeared. In *Bird v. Higginson* (a), the declaration alleged that the plaintiff agreed to grant and let, and the defendant to take, a messuage, with exclusive license to sport over a manor, &c. during the term; to hold the messuage, rights, liberties, and premises, for the term, at a rent; that the plaintiff accordingly let the messuage, rights, &c. to the defendant, who entered into and

(a) 2 Ad. & Ell. 696; 4 Nev. & M. 505; S. C. in error, 6 Ad. & E. 824.

CASES IN THE EXCHEQUER,

upon the same, and became and was possessed thereof for the term; and assigned as a breach non-payment of the rent. It was held, on general demurrer, that the plaintiff could not recover as for rent, the agreement not being under seal; and that the declaration was insufficient to entitle him to claim as for a compensation for use actually had of the subject of demise, since it alleged only his entry and possession, and not an *occupation*. That case is directly in point against the present plaintiff.

The plea raises in effect the same point as that which arises on the declaration: and (assuming for the present purpose that it went to all the inventions) *Hayne v. Malby* is a distinct authority that it is a good bar. *Buller*, there says—"It is now discovered that the plaintiff has such right, and therefore the defendant has not the con-

deration for which he entered into this covenant; and notwithstanding which they insist that he is still bound. think that the case of landlord and tenant is not unlike this; for the facts in this case disclosed by the pleas are equivalent to an eviction of the tenant: when he is evicted he has a right to shew that he does not enjoy that which was the consideration for his covenant to pay the rent notwithstanding he has bound himself by the covenant.

And this is a stronger case than that, because here alleged that the plaintiff knew at the time of the agreement that the invention was not new; and here also the deed, and therefore no question of estoppel can arise. When it is made to appear that the plaintiff had to convey the subject-matter of the agreement, the defendant may stop there, and the plaintiff must shew that the invention was not new; and here also the deed, and therefore no question of estoppel can arise.

different case from the present; there it appears that the plaintiff had actually used the machine by the permission. But further, this is an agreement for the enjoyment of other patent rights besides the one in question. The proposition is not disputed, that if the

Taylor v. I

considerations moving to a promise, and one of them fails, that can be taken advantage of only in mitigation of damages: but those are cases in which the party has enjoyed some part of the consideration; here there is no averment that he has enjoyed any; and the objection is, not that there has been a partial failure of consideration, but that one of the considerations alleged for the promise was *false* within the plaintiff's knowledge; that is a complete answer, the whole contract being executory: Com. Dig. Action on the Case on Assumpsit, B. 13. In *Boon v. Eyre*, and all the other cases cited, it distinctly appeared that the party had had the enjoyment of a part at least of the consideration for his promise; and the contract being executed, the consideration apportioned itself, and the plaintiff had, at all events, a right to recover pro tanto: here he seeks to recover a specific sum. [*Alderson*, B. This is in effect the same point as the former—whether the declaration is sufficient.]

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

II. There is a clear variance between the agreement and the declaration, and it is not one which the Court will amend under the statute. The declaration states the agreement to have been made between the plaintiff and defendant, whereas it is between the plaintiff and three others of the one part, and the defendant of the other. The consideration also is wrongly stated; for the consideration proved moves not from the plaintiff alone, but from him and the three other parties. [*Cleasby* insisted that, on the form of the rule, which was to enter the judgment, under the statute, according to the very right of the case, the question of variance did not arise.]

III. The plaintiff is not entitled to sue alone. The test is, whether he is severally interested *in the contract*, not whether he has a several interest in the money to be received under it: 1 Chit. on Pl. 2; *Anderson v. Martindale* (a). If a person conveys land, half to A. and half to B., and covenants with both for quiet enjoyment, &c.,

(a) 1 East, 497.

L. of Pleas,
1838.

CHANTER

v.
LEESE.

there the covenant attaches itself to the estate, and is several; the interest in the estate determines the interest in the covenant. But there is nothing like that in the present case: and to see in whom the legal interest is, we must look to the whole instrument. The consideration for the defendants' agreement is a license granted by all the four parties. They would probably never have agreed to take a license from the plaintiff only in respect of his share in the patent rights, if they could not have obtained the others also. The Court cannot see that it would have been of any profit to the defendants to vend one only; it may be the combination of all the patents which alone enables them to bring out a machine more useful than the *all*. Suppose the defendants were obstructed in the use of them, whom must they sue? All the contracting parties, because all concur in granting the license. Again, the defendants are to enter the payments as against all the licensors: and the latter are all to have inspection of the books. Each of them has rights arising out of the profits of the inventions of the others. What the plaintiff has to receive depends upon the payments to be made to the others. It is like the case referred to in 1 Saund. 116 a. n. 2, where A. and B. brought assumpsit, and declared that their several cattle had been distrained, and that the defendant, in consideration of 10*l.* paid him by the plaintiffs, promised to procure the cattle to be redelivered to them by such a time: it was held that the action was well brought jointly, for though the thing to be performed was several and not joint, the contract and consideration were joint, and it was not known how much one gave, and how much the other (*a*). So here, it does not appear what value was put upon each of the patent rights. In *Hatsall v. Griffith* (*b*), it appeared that A. was entitled to certain shares in a ship, and B. and C. were owners of

(*a*) *Vaux v. Steward*, 1 Rol. Abr. 31, pl. 9; Styles, 156, 203.

(*b*) 2 C. & M. 679.

Exch. of Pleas,
1888.

CHARTER
v.
LEESE.

remaining shares, and that B. and C. employed D. to sell the vessel; he did so, and paid over to B. and C. their proportions of the purchase-money, but refused, without their concurrence, to pay A. his portion; it was held that A. could not sue him for it alone, but must join B. and C. Yet there it is clear that each had separate interests in the subject-matter. The cases on the other side are all distinguishable. In *Brand v. Boulcott*, the only contract was, that the defendant should pay his share of contribution to each of his co-assignees who had overpaid. In *Willis v. Bircham*, the annuities were several, and therefore the contract was several, according to the estate. In *Servante v. James*, the covenant was clearly several, being with the parties and "their several and respective executors." [Lord Abinger, C. B.—Suppose A., B. and C. were each owner of a horse, and agreed in writing that each should deliver a horse to D., on condition that he should pay 100*l.* to A. There each furnishes a part of the consideration, and each has an interest in the performance of the contract. *Alderson, B.*—Or suppose A. had a house, A. and B. the next to it, A. and C. the next, and A. and D. the next; and they agreed to let them to E., he paying A., B., C. and D. each so much—should not the action be joint?]

Cleasby, in reply.—It is submitted that, in the cases just put, the interest would be several, and therefore the actions should be so:—*Withers v. Bircham* is an analogous case. If two tenants in common agreed to let the land, reserving rent to each, they might sever in an action for rent, as in an avowry. *Halsall v. Griffith* is altogether distinguishable; there the defendant was employed by B. & C. to sell the ship, and sold it as their agent, and had no right, without their concurrence, to pay over any part of the proceeds to a third party. The authority cited from *Roll's Abr.* only decided that the parties *might* join, not that they must; and since that period the law on this

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

subject has been much more considered; the old are conflicting. In *James v. Emery* (a), it was expressed, in the Exchequer Chamber, that if the interested covenantees be several, they may maintain several actions although the language of the covenant be joint. [*Abinger, C. B.*—It appears to me that the defendants are to pay the plaintiff the 400*l.* in respect of all that plaintiff and the others are to grant him. We see they are giving something in consideration of the 400*l.*] The plaintiff is interested in all the patents; therefore the defendants agree to pay him a certain sum in all events and to pay them other sums contingently. The argument derived from the other joint clauses is not at all decisive; they may be joint, and yet the interests be several.

With respect to the other point, it does sufficiently appear on these pleadings, that the contract has been executed by the plaintiff. If any thing has taken place which prevents it from being enjoyed, it is for the defendants to shew it; the plaintiff has done all he can in giving the license. Each party must shew that what is within his own knowledge. The *enjoyment* is an inference of law from the grant of the license—it consists in the *right to enjoy*: the *using the machines* depends on the defendants themselves. The declaration is therefore good without any additional allegation; and the same reasons shew that the plea is bad, and that it is on the defendants to shew that they have *not* enjoyed. They have the option, the right is vested in them, and the license must be taken to have been enjoyed until they shew the contrary. It is not like a contract to do a particular act; as soon as the plaintiff had signed the agreement, *primâ facie* all was complete on his part. *B v. Higginson* has no application to this case: it is clear that an easement in land cannot be granted without the parol agreement, therefore, operated as a mere license.

(a) 8 Taunt. 245.

to the defendant to go upon the land, which could not entitle the plaintiff to a rent. This is a contract merely for a license, and not for enjoyment, in the sense of *occupation*; and the user under the license both rests in the defendants' option, and lies within their knowledge.

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

Cur. adv. vult.

The judgment of the Court was delivered on a subsequent day, by

LORD ABINGER, C. B.—We think the judgment ought to be for the defendants on the demurrer. The declaration is founded upon the contract, and nothing but the contract. If a man contract to pay a sum of money, in consideration that another has contracted to do certain things on his part, and it should turn out, before any thing is done under it, that the latter was incapable of doing what he engaged to do, the contract is at an end. The party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated. If, indeed, he does accept of a partial performance, and to a certain extent enjoys the benefit of that for which he stipulated, it may become a question whether he may not be liable upon an implied contract to pay for what he has had; as, when the consideration is in its nature capable of being divided, and the payment apportioned, by the terms of the contract, there may still be a right to recover the portion due upon the original contract. So, where a party takes an estate under a conveyance, with a warranty of title in the vendor, he cannot afterwards object to paying the consideration on account of the want of a good title to a part of the estate, but must resort to his action on the warranty. This was the case of *Boon v. Eyre*, cited in the argument. But in the present case it does not appear to the Court that the defendants ever accepted or enjoyed any part of the patents which were the consideration of their agreeing to pay 400*l.* a-year to the plain-

Exch. of Pleas,
1838.

CHANTER
v.
LEESE.

tiff, nor that the sum they so agreed to pay can in any manner be apportioned amongst the different patents which they might have had, the possession of all and each being an entire consideration. The plea, therefore, impeaching that consideration, is a good plea to avoid the whole contract as it appears on the record.

With respect to the proceedings on the rule, we are rather inclined to think that this contract being with all of the parties, founded upon a consideration to part of which each was a conducting party, the action ought to have been by all, upon the promise made to all, though only one was to receive the money: but it is not necessary to give any judgment on this point, because we think there was a variance between the declaration and contract, in not setting out all the contracting parties, and that the plaintiff therefore ought to have been nonsuited.

Judgment for the defendant on the demurrer: and rule absolute to enter a nonsuit.



SINCLAIR and Another, Assignees of GEE, a Bankrupt, v.
BAGGALEY.

A written paper, containing a statement of mutual accounts between a creditor and a bankrupt by whom it was signed, and bearing date previous to the bankruptcy, shewing a balance due to the creditor, is *prima facie* evidence, as against the assignees, in an action

DEBT for goods sold and delivered by the bankrupt, and on an account stated. Plea, a set-off for goods sold and money paid to the bankrupt, and on an account stated.

At the trial before *Littledale, J.*, at the last Nottingham Assizes, the defendant, having proved goods sold to, and bills paid for, the bankrupt to some amount, offered in evidence a paper, containing a statement of mutual accounts between himself and the bankrupt by whom it was signed, and bearing date October 12, 1836, which was previous to the bankruptcy, by which a balance appeared to be due to the

brought by them against the creditor, that it was written at the time it bore date.

Semle, that such a document is evidence of *payment*, and not of a *set-off*, and ought to be pleaded as such.

defendant. The plaintiff's counsel objected that this document was not admissible, as it was not proved to have been signed by the bankrupt before his bankruptcy. The learned judge, however, after consulting with *Park, J.*, was of opinion that the instrument was to be taken, *prima facie*, to have been written at the time it bore date, and allowed it to be read, upon which the defendant obtained a verdict. *Humfrey* having, in Easter Term, obtained a rule to shew cause why there should not be a new trial, on the ground that this evidence was improperly received,

Esch. of Pleas,
1838.

SINCLAIR
v.
BAGGALEY.

Whitehurst and *Miller* now shewed cause. This instrument was admissible as against the assignees, though it might be otherwise if produced in their own favour, without further evidence to shew the time when it was written. The general rule is, that instruments are to be presumed to be written at the time they bear date; *Hunt v. Massey* (a), *Smith v. Battens* (b): and wherever the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading: *Williams v. East India Company* (c). The Court cannot presume that this instrument, bearing date before the bankruptcy, was in reality written afterwards, for that would be to presume the bankrupt to be guilty of fraud for the purpose of cheating his assignees. *Goodtitle dem. Baker v. Milburn* (d) is expressly in point. There, in ejectment by a mortgagee against the assignee (under the Lords' Act) of the mortgagor, it was held that a letter from the mortgagor to the mortgagee, dated previous to the assignment, was evidence against the defendant, and would be presumed to be written at the time of its date, until the contrary were shewn. And *Wright v. Lainson* (e) is not at variance with that decision, for

(a) 5 B. & Ad. 903; 3 Nev. & M. 109.

(b) 1 Mo. & Rob. 341.

(c) 3 East, 192.

(d) 2 M. & W. 853.

(e) 2 M. & W. 739.

Exch. of Pleas,
1838.

SINCLAIR
v.
BAGGLEY.

there the assignees were setting up a right from the date of a document which was the foundation of the commission under which they claimed: and Lord *Abinger*, C. B., points out the distinction between the two cases in the course of the argument in *Goodtitle v. Milburn* (a). Where the assignees are bringing the action, it is clear that they cannot set up the act of the bankrupt in their own favour. This case is very distinguishable from the cases relied upon on the other side. *Dickson v. Smith* (b) is not strictly applicable, but as far as it goes it is in favour of the defendant. That was an action by assignees on a promissory note of the defendant, payable to the bankrupt, and it was held that the defendant could not set off cash notes payable to bearer, bearing date before his bankruptcy, unless he shewed that they came to his hands before the bankruptcy. That was not on the ground that they were not to be presumed to be written when they bore date: but because the defendant was bound to make out all that was necessary to establish his case, which he had not done unless he shewed that the notes were delivered to him before the bankruptcy. [*Alderson*, B.—Is not this document evidence of payment? I apprehend, if parties state an account, and it is allowed and settled between them, it amounts to payment and not to a set-off. You have not pleaded payment.] The only question at the trial was, whether this paper was admissible, as being written at the time it bore date. [*Alderson*, B.—It is quite clear it is evidence of payment, if at all.] But independently of this document, it was proved that goods were sold and delivered by the defendant to the plaintiff. [Lord *Abinger*, C. B.—The account only corroborates that.] *Crease v. Barrett* (c), confirmed by *Doe d. Tatham v. Wright* (d), may be cited to shew that

(a) 2 M. & W. 860.

(b) 6 T. R. 57.

(c) 1 C. M. & R. 919.

(d) 6 Nev. & M. 132.

Exch. of Pleas,
1838.

SINCLAIR
v.
BAGGALEY.

the Court will not weigh the probable amount of the evidence, but will grant a new trial if *any* improper evidence is admitted: but those cases cannot be law to that extent, for then if a defendant pleaded several pleas, and upon any one of them improper evidence was admitted, there must be a new trial, though the evidence related only to that one, and each of the others was an answer to the action; which would be absurd. Here the case was complete without introducing this paper at all, and the defendant must have had a verdict whether it was produced or not. [*Alderson*, B.—The real difficulty is, that the document proves the replication, that the goods had been paid for—that the plaintiff was not indebted.] That point was neither taken at the trial, nor on moving for this rule. The instrument was clearly admissible. according to the decision in *Goodtitle v. Milburn*. *Hoare v. Coryton* (a) will perhaps be relied upon; but that was an action by the assignees, and the account was produced by them in their own favour, to shew the petitioning creditor's debt. If *Taylor v. Kinloch* (b) can be considered law, it is an authority that even when used by the assignees as a proof of the petitioning creditor's debt, the period of its existence would be presumed from the date of the instrument. [Lord Abinger, C. B.—My Brother Parke found a note in 2 Stark. Evid. 105, where it is said that that decision proceeded on a mistaken report of a case on the Northern Circuit (c).] *Smith v. Battens* (d), that indorsements on a promissory note admitting the receipt of interest, must be taken to be written at the time they bear date; and *Hunt v. Massey* (e), that a letter must *prima facie* be taken to be written at the time when it bore date, are decisive authorities in support of the

(a) 4 Taunt. 560.

(d) Mo. & Rob. 341.

(b) 1 Stark. Rep. 175.

(e) 5 B. & Ad. 902; 3 Nev. &

(c) See 2 M. & W. 743, *Wright v. Leeson*.
Man. 109.

Exch. of Pleas,
1838.

SINCLAIR
BAGGALEY.

admissibility of this paper. It would lead to great inconvenience if it were not admissible to prove the date. Suppose the case of a person having contracted a debt for goods sold, who goes and pays it, and takes a receipt for the money in the handwriting of his tradesman; if the receipt were not evidence of itself, but it was necessary to call a witness as to the time it was given, it would frequently be impossible to prove the payment, as the witness who had seen him pay it might have died in the mean time, and the very object of taking a receipt is to avoid the necessity of taking a witness to the payment. Unless some fraud be shewn, the date of such a receipt ought to be evidence of the time when it was written. Here the Court are asked to presume that the bankrupt, for the purpose of defeating the claim of his assignees, has signed this paper with a false date, which would be fraud and against his interest.

Balguy and Humfrey, contra.—The only question now is, whether this evidence was or was not properly received. The proof of the delivery of these goods at the plaintiff's warehouse was equivocal as to the matter of fact; but when this evidence was received, it put an end to the case on the part of the plaintiffs. No doubt, evidence of the acts of the bankrupt before his bankruptcy was admissible against his assignees; but it lay upon the defendant to shew that this act was done before the bankruptcy, and that he was at the time capable of making the admission contained in the account. The case of *Wright v. Lainson*, where all the former authorities are referred to, is an authority to shew that this evidence was inadmissible. *Taylor v. Kinloch* is disposed of by the observation of *Parke, B.*, in *Wright v. Lainson*, that according to the note in *Starkie on Evid.*, it was decided on a mistaken report of a case on the North Circuit. [Lord *Abinger, C. B.*—In *Wright v. Lainson* the I. O. U.'s were produced for the purpose of supp

Exch. of Pleas,
1838.

SINCLAIR
v.
BAGGALEY.

ing the commission.] Still the principle is the same. The question is altogether one of time, and of the competency of the individual to do the act at the particular time. The bankrupt would not be capable of doing this act so as to bind his assignees after the bankruptcy; then it lay on the defendant to shew that the paper was signed by him before, when he had the power to do so. [*Alderson, B.*—Suppose there is contradictory evidence as to the time of the paper being signed, then the jury would have to look at the document itself.] Suppose that, on looking at the document, they were to find that it was not written at the time it bore date, then it would not be admissible. In a recent case in the King's Bench, *Knight v. Clements (a)*, which was an action on a bill of exchange payable two months after date, the bill, when produced, had the word "two" before "months," but written upon the word "three," and the stamp was sufficient for a bill at two months only: it was held that the plaintiff was bound to shew by extraneous evidence, that the alteration was properly made. Lord *Denman, C. J.*, said, "The plaintiff was bound to prove a bill accepted payable at two months; that which he produced was payable either at two or three months, with no evidence whether it was one or the other; standing by itself, it was obviously no better than a conjecture, for the alteration might have been too late." That case is in point to shew that the party seeking to make the instrument evidence, is bound to shew that it was written in due time. Suppose, instead of documentary evidence, a witness had been called to prove an admission made by the bankrupt, and on being asked when the admission was made, he had said he could not remember, then the evidence of the admission would amount to nothing. [*Alderson, B.*—Suppose the witness stated that the party had said, "As sure as this is the 29th of May, I received this debt,"

(a) 3 Nev. & P. 375.

Exch. of Pleas,
1838.

SINCLAIR
v.
BAGGALEY.

and the witness had stated he did not know whether it was the 29th of May or not, but that was what he said would not that be evidence to go to the jury to say whether the acknowledgment was made on that day?] It contended that *Wright v. Lainson* is an authority to show that this evidence was not admissible without further proof.

Lord ABINGER, C. B.—Those cases where it has been held that promissory notes signed by the bankrupt are not evidence sufficient to support the commission, unless proved to have been in existence before the bankruptcy stand on a peculiar foundation of their own, which distinguishes them from the present. In those cases it was in the interest of the petitioning creditor to support the commission, and owing to the jealousy which the law feels of collusion between him and the bankrupt, the practice has been established, when no other evidence of a petitioning creditor's debt is offered than a paper in the hand-writing of the bankrupt, to require proof of the existence of that document previous to the act of bankruptcy. But it has never yet been held, or even contended, that where a paper is adduced in evidence against a bankrupt, or his assignee, the document itself is not *primâ facie* evidence that it was made at the time it bears date; and I never yet knew an instance where the defendant was called upon to prove the actual date. In cases, for instance, where the evidence consisted of a series of letters, the defendant would not be called upon to prove that they were actually written on the days they respectively bore date; and if bills of exchange were put in dated before the bankruptcy, they would be presumed to be regular, and correctly dated, till the contrary were shewn. Here, then, there is an account put in which purports to have been settled between the bankrupt and the defendant on the 12th October, which I

been assumed to have been before the act of bankruptcy took place. If the fact were otherwise, and this document a fraudulent contrivance, it was open to the plaintiff to shew it; but in the absence of such proof, I think it was good *prima facie* evidence, and that it was properly received.

Each. of Pleas,
1838.

SINCLAIR
v.
BAGGALEY.

BOLLAND, B.—I am of the same opinion. Whether proof of the actual time when the paper was signed is necessary, depends upon which party offers the instrument in evidence. It is here offered by the defendant against the assignees, and no fraud or collusion is suggested. I think, therefore, the rule ought to be discharged.

ALDERSON, B.—If this document were written and signed after the bankruptcy, it would be a fraudulent instrument; and as that cannot in the absence of evidence be presumed, I think the account was properly admitted in evidence, as it must be presumed to have been written at the time it bore date. I am rather inclined to think, however, as to the last question I put to Mr. *Humfrey*, that such an admission would not be evidence of the time when it was made.

GURNEY, B., concurred.

Exch. of Pleas,
1838.

LAYBOURN and Others v. CRISP and Others.

The deputy day meters of the city of London are entitled, by immemorial custom, to the exclusive right, by themselves and their servants, of measuring, shovelling, unloading, and delivering all oysters brought in any boat or vessel for sale along the river Thames to any place within the limits of the port of London, and to receive a reasonable compensation for so doing; and a jury found that 8s. for every score for the first 100 bushels, and 4s. for every score of bushels of the remainder of a cargo, was a reasonable recompense to them for the labour of shovelling, unloading, and delivering out the oysters, exclusive of the sums paid to the corporation of London for metage under the statute 11 Will. 3, c. 24, s. 7.

THIS was an issue directed by *Alderson*, B., sitting on the equity side of this Court, to try the two following questions:—

I. Whether, from time whereof the memory of man is not to the contrary, the deputy oyster meters of the city of London have had and exercised, and still of right ought to have and exercise, the exclusive right and privilege, by themselves and their servants, of measuring, shovelling, unloading, and delivering all oysters which have been or may be brought in any boat or vessel along the water of Thames, for sale, to every place within the limits of the port of London, and to have and receive a reasonable compensation for so doing.

II. Whether the sum of 8s. for every score for the first 100 bushels, and 4s. for every score of bushels of the remainder, of any cargo of oysters brought on board of any oyster vessel, to any market within the limits of the said port of London, for sale, or any other and what sum of money, be a reasonable and proper recompense to the aforesaid deputy oyster meters, for the labour of shovelling, unloading, and delivering out the said oysters.

The cause was tried at bar, on the 15th and 16th of June, before Lord *Abinger*, C. B., *Parke*, *Bolland*, and *Alderson*, Bs., and a special jury of the county of Hertford.

The meters are not therefore bound to perform in their own persons the manual labour of shovelling, &c., but are bound to provide sufficient men for the purpose, and are liable to an action in default of their doing so.

On an issue as to the existence of such immemorial right of the deputy day meters:—*Held*, that a decree of a Court of Equity, in a cause between third parties, touching the same right, whereby an issue was directed to try whether the above sums were a reasonable recompense, was admissible in evidence.—*Held*, also, that the party producing it was not bound also to put in the depositions in the cause, which were referred to (in the usual form) in the decree; but *semble* that the other party would be entitled to read the depositions as *his* evidence.

Where a document has been put in by one of the parties in a cause, and portions of it have been read at the instance of the opposite counsel, he is then too late to object to its admissibility.

Counsel for the plaintiffs, Sir *F. Pollock*, *Thesiger*, *Exch. of Pleas*,
R. V. Richards, and *Wood*. 1838.

Counsel for the defendants, Sir *W. Follett*, *Platt*, *Will-*
cock, and *Channell*.

LAYBOURN
 v.
 CRISP.

For the plaintiffs, a charter granted by James I. to the city of London, bearing date 20th August, 3 Jac. I. (1604) was put in. It recited, that "whereas the mayor, commonalty, and citizens of London, from all time whereof the memory of man is not to the contrary, have had and exercised &c. the office of bailiff and the conservancy of the water of Thames &c., and have had and exercised, and ought to have been accustomed to have and exercise, the office of measurer, and the measuring of all and every the coals and grains of every kind, and also all sorts of salt, all sorts of apples, pears, plums, and other fruits whatsoever, and of all eatable roots of every kind, and also of onions, and of all other merchandises, wares, and things whatsoever measurable, and the measuring of the same, landed, conveyed, or brought in or to the port of the said city of London, upon the said water of Thames, in every ship, boat, barge, or other vessel whatsoever, floating, laden, remaining, or being on every part of the same water of Thames, and upon every bank, or every shore, or every wharf, of the same water of Thames, which should happen to stop, remain, and be delivered or set down, from the bridge of the town of Staines, in the county of Middlesex, westwards, to London bridge, and thence to the place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea and eastwards, and in the Medway, and in the said port of the city of London aforesaid; to exercise and occupy the same office of measurer, and the measuring aforesaid, by the mayor of the city aforesaid, for the time being, during the time of his mayoralty, or by his sufficient deputies. And also for all the same time have had and taken, and ought to have been accustomed to have and take, to their own use, by the mayor of the city afore-

Exch. of Pleas,
1838.

LAYBOURN

v.
CRISP.

said, for the time being, during the time of his mayoralty, or by his sufficient deputies, all wages, rewards, fees, and profits, to the same office of measurer belonging and appertaining." The charter then, after further reciting that the corporation had been disturbed in some of the measuring, especially in the measuring of coals, stated that, "in order to put an end to all controversy," the king did thereby grant to the mayor, commonalty, and citizen, and their successors, to exercise and enjoy the aforesaid office of measurer, and the measuring, of all and every the coals and grains of every kind, &c. [in the same words as in the recital.]

A subsequent charter, dated 28th September, 6 Jac. 1, (1607), was also put in, which recited as follows:—"Whereas within our said city of London, the liberties, suburbs, and port of the same, as we are informed, the search and surveying of oil, hops, tallow, salt, butter, cheese, and other such like things, coming or brought to the port of the city of London, with the intent to be sold or to be exposed to sale by way of merchandise, and also the measuring of all corn of whatever kind, onions, salt, sea-coals, and fruit of all kinds, *fish called shell-fish*, measurable and accustomed to be measured, coming and brought to the said port of the city of London, with the intent to be sold by way of merchandise, hitherto have pertained and belonged to the mayor, and commonalty, and citizens of the city aforesaid, and their predecessors, to be exercised and executed by the mayor of the aforesaid city for the time being, according to the laws, ordinances, and statutes thereof made, and of the customs of the city aforesaid," &c.—Two inspeximus charters, of the 14 Car. 1, and 15 Car. 2, which recited and confirmed the former charters, were also put in.

An examined copy of a judgment of the Court of King's Bench, of Michaelmas Term, 1779, in an action of assumpsit, *Pillett and Another v. Bowmer and Others*, was put

in and read without objection. The first count of the declaration was for 26*s.*, for the work and labour of the plaintiffs, done, performed, and bestowed for the defendants, at their special instance and request, in and about the shovelling and unloading divers, to wit, 65 bushels of oysters of the defendants. The second count was on a quantum meruit; the third and fourth differed from these only in stating the work to have been done by the plaintiffs and their servants; and there were also counts for money paid, and on an account stated. The only plea was nonassumpsit, and there was a general verdict for the plaintiff, damages 26*s.*

Exch. of Pleas,
1838.

LAYBOURN
v.
CRISP.

A decree of the Court of Exchequer in Equity, in a cause of *Milburn v. Fisher*, dated 13th May, 1783, was then given in evidence. The decree, after reciting the bill and answer, directed an issue to be tried, "whether the sum of 8*s.* per score for the first 100 bushels, and 4*s.* per score for the remainder of the cargo, on board each of the oyster vessels brought to Billingsgate market for sale, be a reasonable and proper recompense to the plaintiffs, the deputy day meters, for the shovelling, unloading, and delivering out the said oysters." The decree was drawn up in the usual terms, on hearing counsel and reading of the depositions and exhibits. And by a subsequent decretal order of the 9th of February, 1784, it appeared that this issue was found for the plaintiffs, and an account was directed. The bill and answer were also put in. The bill appeared to be filed by the then eighteen deputy day meters, and the representatives of some of their predecessors who were dead, and stated that they enjoyed the said offices of deputy day meters, with all perquisites thereunto belonging, and that they by themselves or their assistants had shovelled and unloaded oysters for the defendants; and prayed an account.

Sir *W. Follett* desired to have certain passages read

Exch. of Pleas,
1838.

LAYBOURN
v.
CRISP.

from the recitals in the decree. The following allegations of the bill, as recited in the decree, were read accordingly:—That the city of London was an ancient city, and that the mayor, and commonalty, and citizens thereof, were, from time whereof the memory of man was not to the contrary, entitled to the metage of all oysters brought to the market of Billingsgate for sale; and that from time whereof &c., four officers, called yeomen of the water-side, had been appointed to the office of measuring all oysters brought to the said market, and for all the time aforesaid, found and provided measures and other convenient utensils for measuring the said oysters, and also the shovelling, unloading, and delivering the said oysters; and that the said yeomen had also, at divers times, from time to time as they saw fit so to do, appointed twenty-one freemen of the city of London, and members of the society of fellowship-porters, as their deputies or assistants; and that in consequence of the increase of the size of the oyster-boats, disputes had arisen as to the rate of payment for the labour and attendance of the deputy day meters, and that at a meeting of proprietors of oysters brought into the said market, in 1771, the said rates of 8s. and 4s. were agreed upon, and had been paid since that time.—By the answer, the defendants admitted the right of the city to the metage, and alleged that the payments made to the corporation for the metage included the price of the whole of the labour bestowed in the shovelling, unloading, and delivering the oysters.

Sir *W. Follett* then required that the depositions in the above cause should be put in and read, but the plaintiffs' counsel declined to do so.

Sir *W. Follett* thereupon objected, that the decree was not admissible in evidence without the depositions. First,

this is a question of custom ; it does not appear on the face of the decree, that any issue arose as to the custom ; the bill is so framed as to entitle the plaintiffs to an account, if they had done all the work on the defendants' boats ; and whether the decree was made on proof of the custom cannot therefore appear but from the evidence in the cause, which is stated in the depositions. But, secondly, the decree refers to and professes to be founded upon the depositions, and they thus become a part of the record.

Exch. of Pleas,
1838.

LATBOURN
v.
CRISP.

Sir F. Pollock and Thesiger, contra.—First, this objection comes too late, a part of the decree having been already read to the jury at the instance of the defendants' counsel. But the decree is clearly admissible without the depositions. It appears from the bill and answer, that certain questions of right were in dispute between the parties ; and by the decree it appears what judgment the Court pronounced on these questions. The decree in effect establishes the right, because, unless the Court had been satisfied of the right as claimed, they would never have directed an issue merely as to the amount. It might as well be argued, that because a rule of Court is drawn up on reading affidavits, it could not be read, in cases where it is receivable in evidence, without reading the affidavits also ; or that a judgment at law could not be proved without reading the parol evidence in the cause. The defendants may read the depositions as *their* evidence if they think fit.

Lord ABINGER, C. B.—Three points arise for the determination of the Court. I am certainly disposed to agree that a decree would be of no effect as proof of a custom, without some evidence what the question in issue really was. When a record is produced to prove a custom, and there is no direct issue on the custom, the constant practice is to give some evidence to shew that the custom

Exch. of Pleas,
1838.

LAYBOURN
v.
CRISP.

was really in question: otherwise a verdict in indebitatus assumpsit would prove nothing. I am not however prepared to say that, on a full examination of the bill and answer, there is not something shewn which makes this decree per se evidence; I cannot say but that I entertain a very strong inference from it as it stands. But on the question whether the depositions must be produced, I think clearly that that is not necessary. When a party desires to give evidence of a custom, and proposes to read the depositions of ancient witnesses, who are dead, for the purpose, he cannot read the evidence without first putting in the bill and answer, to shew that it was a question between the same parties, or between parties claiming the same right; but where a decree is evidence on the face of it, as *prima facie* having some relation to the matter in issue, the putting in of the evidence on which it proceeded is not necessary. We do not sit in judgment on the question whether it was a right decree: it is only evidence that the same right was in litigation in that cause, and was established in the opinion of the judge. I am not, however, prepared to say that the defendants' counsel may not put in the depositions as his evidence.

PARKE, B.—I am of the same opinion. I have never heard it doubted, that a decree of a court of equity is evidence of reputation, in the same manner as a verdict. The objection to the admissibility of this decree seems to me to come too late; but if it had been made earlier, I do not think it could have prevailed: I think the custom is in issue on the face of the pleadings. Whether it would be of effect to prove the particular custom alleged may be a question hereafter; but I think the plaintiffs do claim on a custom in the bill, and that it is affirmed by the answer. Then are the depositions necessarily to be read as part of the plaintiffs' case? I think not. The only

ground on which it can be contended that they are, *Exch. of Pleas, 1838.*
 is, that they are necessary to shew what was the matter in issue. But in equity, the Court must collect the questions in dispute from the bill and answer only; not so in the general forms of actions at law. Here the matter in issue appears on the bill and answer themselves.

LAYBOURN
 v.
 CRISP.

BOLLAND, B.—I am of the same opinion on all the three points: first, that this objection was too late; secondly, that the decree is evidence; and, thirdly, that the depositions need not be read as part of the plaintiffs' evidence.

ALDERSON, B.—I am of the same opinion on all the points. First, I think the objection was too late; if not, it might be made at any period of the cause. The proper time to take the objection is when the document is tendered in evidence: it may, indeed, be necessary to look at it to see whether the objection is well-founded; but here it has been looked into to ascertain its effect. But, in the next place, I agree that the decree is clearly receivable. This is a question of custom: all matters having a tendency to prove the custom are receivable in evidence. If the decree had not any such effect, it would not be admissible, being *res inter alios acta*; but it has a tendency to prove facts which have a material bearing on the proof of the custom: it shews, in the first place, that the city has the immemorial right of measuring. The other facts which appear on the face of it may have a more or less cogent effect in establishing the custom, but that constitutes no objection to its admissibility; it is sufficient if it has a tendency to prove any one fact material to the issue. The third question is, whether it is necessary also to prove the depositions. It is said, they are referred to in the decree. But it is by the bill and answer that a court of equity determines what are the issues to be tried; and

Exch. of Pleas,
1838.

LAYBOURN

^{S.}
CRISP.

the decree disposes of the question of fact there admitted or denied. Then, as there is an appeal from the courts of equity, and there could be no effectual appeal unless the facts were stated, it is of necessity that the decree should refer to the evidence, in order to bring it before the court of appeal; but that reference has no further effect. If the depositions were to be received, it would be making this jury a tribunal of appeal from the judgment of the court of equity in 1783, to see whether it came to a right conclusion on the evidence.

The depositions were therefore not read.

The plaintiffs then gave parol evidence to shew that, since the year 1790, the right now claimed had been uniformly exercised at the market of Billingsgate, and the payments in question received by the deputy day meters for the shovelling, unloading, and delivering of the oysters; that the twenty-one deputies or assistants consisted of eighteen day meters, and three night and morning meters, who were appointed by the yeomen of the waterside, and accounted to them weekly; that these yeomen until the year 1826, and afterwards the corporation, provided the measures; that for oysters were paid (according to the statute 11 Will. 3, c. 24, s. 7) 1s. per boat to the corporation, 1d. per boat to the Lord Mayor, and $\frac{1}{2}$ d. per bushel to the yeomen of the waterside (until within a few years, when by a new arrangement the $\frac{1}{2}$ d. also was paid to the corporation), as metage: that the deputy day meters, or some of them, go on board the vessels daily and superintend the measuring of the oysters, to see the measures properly filled as between buyer and seller; that they have men under them, called *holdsmen*, who are also of the company of fellowship-porters, and who actually shovel the oysters into the measure, place it on the deck, and then pour its contents into the buyer's basket; that

the buyer usually gives the holdsman who measures *ld. a* *Rech. of Pleas,*
 peck, but that this is a mere gratuity. Evidence was also 1838.
 given of the receipt of the 8s. and 4s. on several occasions, *LAYCOURN*
 in respect of cargoes of oysters landed elsewhere within *v.*
 the port of London than at Billingsgate; and that the city *CRISP.*
 meters always measured, and the fellowship-porters who
 assisted them landed, all corn, salt, potatoes, and fruit,
 brought into any part of the port.

Sir *W. Follett*, in addressing the jury for the defend-
 ants, contended that the custom alleged on the part of
 the plaintiffs was bad in law, and that the Crown had no
 power, by modern grant, to impose such a restriction on
 the subject without a corresponding benefit: *Jenkins v.*
Harvey (a): but even if that were not so, the claim of
 the plaintiffs was quite beyond the grant contained in the
 charters of James I., and that a bye-law made to enforce
 such a custom would be illegal, *Cuddon v. Eastwick* (b),
 (where it was held that a bye-law compelling strangers to
 employ city porters within the city of London was bad);
Com. Dig. Bye-Law, (C). 2: that the present claim was
 clearly not immemorial, nor the deputy day meters imme-
 morial officers, but that they had no doubt been ap-
 pointed in consequence of the passing of the statute
 11 Will. 3, c. 24, which fixed the tolls of Billingsgate-
 market, and the payments had been then regulated by
 agreement, as appeared from the statement in the bill in
Milburn v. Fisher; that all which that case established
 was, that the work having been actually done, the plaintiffs
 were entitled to be paid for it, and the only question was
 as to the amount of the payment; that the corporation of
 London might be admitted to have a good title to the pay-
 ments for the metage, but that the importers of oysters had
 a right to demand that for these payments the actual mea-
 suring should be performed; and that it was clear the
 services of the deputy meters were of no value, the labour

(a) 1 C. M. & R. 377; 2 Id. 393. (b) 1 Salk. 143, 192; 6 Mod. 123.

Arch. of Pleas,
1838.

LAYBOURN

v.

CRISP.

of shovelling, unloading, measuring, and delivering, which was in fact all one manual operation, being performed by the holdsmen.

Lord ABINGER, C. B., in summing up, expressed the opinion of the Court that the custom alleged was good in law, as had been decided in the case of *Fazakerley v. Wiltshire* (a), in which *Cuddon v. Eastwick* was cited and considered; that the metage (the immemorial right of the corporation to which was clear) did not imply any manual labour, and that it was not necessarily any part of the duty of the meters themselves, as such, to perform the manual operation of shovelling the oysters; but that they were bound, for the payments claimed, to provide sufficient men for that purpose, and were liable to an action if they did not do so; that although it was not expressly stated in the bill in *Milburn v. Fisher* that the deputy day meters were immemorial officers, yet it might be reasonably inferred that the Court would not have pronounced that decree if it had not been satisfied of the immemorial right, which alone could have enabled the plaintiffs to support the bill jointly. He left it to the jury also to say whether, from the usage and enjoyment since 1790, they would not presume a legal origin of the custom: and, with respect to the second issue, whether the amount, proved never to have been disputed since 1771, when it was found by a jury to be reasonable which finding was confirmed by the Court, was not sufficiently proved to be a reasonable payment.

The jury found that the plaintiffs had the exclusive right of doing the labour, and that 8s. a score for the first five score bushels, and 4s. for the remainder of the cargo, was reasonable, exclusive of the sum payable for metage.

Verdict for the plaintiffs.

(a) 1 Str. 462.

Exch. Chamber,
1838.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

FRANCIS v. DOE d. COLLAN HARVEY.

EJECTMENT to recover possession of two stamping mills and a watercourse whereby the same were worked, situate in the parish of Gwennap, in the county of Cornwall. There were two demises, dated respectively the 27th March, 1836, and 10th January, 1837.

At the trial before *Patteson, J.*, at the Cornwall Summer Assizes, 1837, evidence was given by the lessor of the plaintiff, that the defendant, on the 1st January 1826, and from thence down to the days of the several demises in the declaration, was a partner and adventurer in the company of adventurers working the Consolidated Mines in the said parish of Gwennap, and that the company had, at various times between Lady-day 1826 and Lady-day 1836, paid rent to the lessor of the plaintiff for the use and occupation of the premises mentioned in the declaration, at the rate of 32*l.* per annum, half-yearly, at Michaelmas and Lady-day; and that on the 18th September, 1835, the lessor of the plaintiff served the defendant with the following notice to quit the premises:—"To the partners or adventurers in the Consolidated Mines in the parish of Gwennap in the county of Cornwall, and to every of them: I do hereby give you notice to quit and deliver up to me, the possession of all those the stamping-mills, watercourse, and hereditaments, with the appurtenances which you the said partners and adventurers now

Ejectment for two stamping mills, on the demise of C. H. The mills had been let to a mining company by C. H. from year to year, and notice to quit had been given by him to the company. On the day of the demise in the declaration C. H. was a partner in the company, and the defendant, who was another partner, defended on behalf of the company. At the trial it was ruled that the defendant was estopped from disputing the title of C. H., although C. H. had admitted in an answer in Chancery, which was in evidence, that he had no legal title:—*Held*, on a bill of exceptions, first, that the defendant was estopped from disputing C. H.'s title,

notwithstanding C. H. was a partner with him in the company; and secondly, that C. H. being a member of the company was no objection to an ejectment brought on a demise by him.

Ch. Chamber,
1838.

FRANCIS
v.
DOE
d.
HARVEY.

hold of me at the yearly rent of 32*l.*, situate &c., on the 25th day of March, in the year 1836, provided your tenancy commenced on the 25th day of March, or otherwise that you quit and deliver up the possession of the said stamping-mills, &c., at the end of the year of your tenancy, which shall expire next after the end of half a year from the time of your being served with this notice. Dated this 18th day of September, 1835.—Collan Harvey." It was also proved that, after the service of this notice, and before the subsequent Lady-day, the company made several applications by letter to the lessor of the plaintiff, proposing to retake the premises of him for another term of years after the expiration of the notice.

The defendant gave in evidence an answer sworn by the lessor of the plaintiff in a suit in Chancery wherein John Taylor and Francis Baily, on behalf of themselves and all other the members of the partnership or company called the Company of the Adventurers of the Consolidated and United Mines, were the plaintiffs, and the lessor of the plaintiff was the defendant, in which he admitted that he had not, at the time of the contract to let the premises to the company, and the letting them into possession in 1826, or at any time since, any legal estate or interest in the premises, but had merely an equitable interest in a moiety of them, and that the legal estate and interest in the whole belonged to and was vested in one John Williams, as to one undivided moiety to his own use, and as to the other moiety, in trust for the lessor of the plaintiff; but that the latter had, prior and up to the year 1826, let the premises to divers persons as tenants to him; and that, in the year 1826, in consequence of applications from the said company of adventurers to the lessor of the plaintiff, it was agreed between them that the company should take the premises of him as tenants to him from year to year, at the rent of 32*l.*, payable half-yearly, the tenancy to commence at Lady-day 1826;

and that they were let into possession accordingly by the lessor of the plaintiff, in the year 1826, and had never since given up the possession. The defendant proved also that the lessor of the plaintiff was, at the time of the several demises mentioned in the declaration, and continued to be at the time of the trial, a partner or co-adventurer with the defendant in the said Company of Adventurers in the Consolidated and United Mines. On this evidence it was contended for the defendant that the lessor of the plaintiff was not entitled to recover the possession of any part of the premises, or at all events a moiety only. For the plaintiff it was insisted, that as the company had obtained possession of the whole of the premises from and under the lessor of the plaintiff, as his tenants, they could not dispute his title until they had given up the premises to him. The learned judge, in summing up, stated that, upon the evidence, he was of opinion that the defendant took the premises in the declaration mentioned from the lessor of the plaintiff as his tenant, and was not at liberty to dispute his title, notwithstanding he was at that time an adventurer; that the lessor of the plaintiff was not proved to have disposed of his share as adventurer in the company, but that he thought his continuing to be an adventurer did not affect his right to recover. Under this direction, the jury found a verdict for the plaintiff; whereupon the defendant's counsel tendered a bill of exceptions, which was sealed by the learned judge, and a writ of error sued out thereon, which now came on for argument. The following were the points for argument stated on the part of the plaintiff in error :—

Exch. Chamber,
1838.

FRANCIS
v.
DOE
d.
HARVEY.

1. That as the lessor of the plaintiff was a partner of the defendant below, and therefore jointly with him in possession of the premises sought to be recovered, the defendant below was not estopped from shewing that the lessor of the plaintiff below had no legal title: and—

Esch. Chamber,
1838.

FRANCIS
v.
DOE
d.
HARVEY.

2. That the lessor of the plaintiff being, as a partner of the defendant below, in possession of the premises jointly with him, is not entitled to recover against the defendant below in an action of ejectment.

Erle, for the plaintiff in error.—First, the defendant was not estopped, under the circumstances, from shewing the want of a legal title in the lessor of the plaintiff. The action of ejectment is in principle an action for a wrong. The confession of lease, entry, and ouster, under the consent rule, cannot prove that the defendant was a trespasser before the commencement of the action; *Right v. Beard* (a). And the principle of estoppel does not apply here, because the lessor of the plaintiff himself was in actual possession with the defendant as one of the adventurers. There can be no estoppel as between the lessor of the plaintiff and his co-tenants.

Secondly, the lessor of the plaintiff being a co-partner with the defendant, is precluded from recovering. This is an action of trespass, wherein the plaintiff is in effect complaining of a wrong done by himself jointly with others. He is liable to contribution for the costs and damages, and also for the mesne profits of the company, if sued for them. It is clear that a joint-tenant cannot sue his companion in trover; *Brown v. Hedges* (b). So, it was held that a member of a friendly society could not sue in trover against another member, who had taken from him a box containing the fund of the society, and which he, the plaintiff, was bound to keep safely; *Holliday v. Camsell* (c). It is unnecessary to cite authorities to shew that in cases of contract a man cannot sue himself. The rule is clear, that in an action at law the same person cannot be both plaintiff and defendant. Here the lessor of the plaintiff is virtually a co-defendant.

(a) 13 East, 210.

(b) 1 Salk. 290.

(c) 1 T. R. 658.

Montague Smith, for the defendant in error.—The estoppel applies to each and all of the adventurers, and therefore binds the defendant. But further, the lessor of the plaintiff was never a co-tenant with the defendant, for it does not appear on the bill of exceptions that he was an adventurer when the tenancy commenced; and his subsequently becoming a co-partner would not make him a tenant to himself. It does not seem to be clear what is the legal effect of a grant from a man to himself and others. Lord Mansfield considered that nothing would pass out of the grantor—that the whole legal estate would remain with him; *Harker v. Birkbeck* (a); and Mr. Serjeant Hill, in a note to this case, adds a quære, whether the effect of such a grant would not be that the whole estate would pass at law to the other grantees, who would be trustees in equity for the share of the grantor. Which-ever may be the operation of such a demise, the lessor of the plaintiff would not have been a joint tenant with the defendant, even supposing he had been a partner at the time he let to the company, and it is clear his subsequently becoming an adventurer would not alter the previous relation of the parties. There is, therefore, nothing to prevent the estoppel.

Secondly, The technical difficulty raised in the case, that the lessor of the plaintiff is a co-defendant, and cannot recover from himself, may be met by the technical answer that not he, but John Doe, is the plaintiff on the record. There would be nothing repugnant to the technical rule that the same person cannot be both plaintiff and defendant, if the lessor of the plaintiff had been actually named as a defendant. Formerly the plaintiff was the real lessee, and the lessor was always the defendant, for the origin of the action was to enable the lessee to recover his term from his own lessor, who might have ousted him of it. The

Exch. Chamber,
1838.

FRANCIS
v.
DOE
d.
HARVEY.

(a) 3 Burr. 1563.

Exch. Chamber,
1838.

FRANCIS
v.
DOE
d.
HARVEY.

plaintiff although now nominal, is still, for technical purposes, the plaintiff on the record. But here the lessor of the plaintiff is not a defendant on the record, and to enable the defendant to take advantage of his being co-tenant, he ought not to have confessed an ouster. After an actual ouster, ejectment will lie by one tenant in common against another. Here the defendant has entered into the common rule, confessing an ouster.

Erle, in reply.—It matters not to the present question what estate passed from the lessor of the plaintiff to the company; that lawful interest may be treated as entire at an end; the plaintiff now sues for a wrong in which he was jointly participant.

As to the answer given to the second point, *Bull. N. P. 232*, and *Aslin v. Parkin (a)*, are authorities to shew that the courts will take notice that the lessor of the plaintiff is the real party in ejectment.

Lord DENMAN, C. J.—We think that the company, having taken possession of the premises under the lessor of the plaintiff, are estopped from disputing his title, and that every member of the company is also so estopped. We also think, that as the plaintiff was not a member of the company when the tenancy commenced, and does not appear to be in possession as one of the company, there is no question as of joint wrong doers. We are also of opinion there is no incongruity on the record: and the judgment will be affirmed.

Judgment affirmed.

(In Error from the Court of Exchequer.)

Esch. Chamber,
1838.

LEVY v. LANGRIDGE.

A WRIT of error having been brought on the judgment of the Court of Exchequer in this case (a), it was argued in last Michaelmas vacation, by *Erle* for the plaintiff in error, and by *Bompas*, Serjt., for the defendant in error. For the plaintiff it was contended, that the case of *Pasley v. Freeman* (b), and the other authorities on which the judgment of the Court below was founded, were distinguishable from the present, on the ground that in all of them the defendant made the false representation to the plaintiff, in respect of some legal matter then in agitation between them. The learned counsel referred to the following authorities:—*Crosse v. Gardner* (c), *Medina v. Stoughton* (d), *Risney v. Selby* (e), *Harvey v. Young* (f), *Bayley v. Merrell* (g), which were antecedent to *Pasley v. Freeman*: and to the subsequent cases of *Eyre v. Dunsford* (h), *Haycraft v. Creasy* (i), *Tapp v. Lee* (k), *Foster v. Charles* (l), *Corbett v. Brown* (m), *Humphrys v. Pratt* (n),

In case, the declaration stated that L., the father of the plaintiff, bargained with the defendant to buy of him a gun, to wit, for the use of himself and his sons; and the defendant then, by falsely and fraudulently warranting the gun to have been made by N., and to be a good, safe, and secure gun, then sold the gun to L. for the use of himself and his sons, for 24l., whereas in truth and in fact the defendant was guilty of great breach of duty,

and of wilful deceit, negligence, and improper conduct, in this, that the gun was not made by N., nor was a good, safe, and secure gun, but on the contrary thereof, was made by a very inferior maker to N., and was a bad, unsafe, ill manufactured and dangerous gun, and wholly unsound and of very inferior materials, of all which the defendant, at the time of such warranty and sale, had notice; and that the plaintiff, knowing and confiding in the said warranty, used the gun, which but for the warranty he would not have done; and that the gun, being in the hands of the plaintiff, by reason and wholly in consequence of its weak, dangerous, and insufficient construction and materials, burst and exploded, whereby the plaintiff was greatly wounded, &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost the use of his hand;—Held, on error, (after verdict for the plaintiff on the plea of not guilty, and on other pleas denying the warranty, and that the gun was unsafe, &c.), that the action was maintainable.

Where judgment is given in a court of error for the defendant in error, the Court is bound, under 3 & 4 Will. 4, c. 42, s. 30, to allow interest for the time that execution has been delayed by the writ of error. Such interest will be calculated at 4 per cent.

(a) 2 Mee. & W. 519, where the pleadings and facts are stated at length.

(b) 3 T. R. 51.

(c) Carth. 90.

(d) Salk. 210.

(e) Id. 211.

(f) Yelv. 20.

(g) 3 Bulstr. 95.

(h) 1 East, 318.

(i) 2 East, 92.

(k) 3 Bos. & P. 367.

(l) 6 Bing. 396; 7 Bing. 105; 4 M. & P. 61, 741.

(m) 8 Bing. 35; 1 M. & Scott, 85.

(n) 5 Bligh, N. S. 154.

Esch. Chamber,
1838.

LEVY
v.
LANGRIDGE.

Polhill v. Walter (a), and *Lyde v. Barnard* (b). The arguments for the defendant in error were in substance the same as those urged in the Court below; and in addition to the cases there referred to, as to the duty imposed by law on a party dealing in articles dangerous to life, the case of *Rex v. Carr* (c) was cited.

The Court took time to consider, and now (June 16th) the judgment was delivered by

LORD DENMAN, C. J.—We agree with the Court of Exchequer, and affirm the judgment on the ground stated by *Parke, B.*, “that as there is fraud, and damage, the result of that fraud not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.”

Ball, for the defendant in error, afterwards applied for interest on the judgment, under the stat. 3 & 4 Will. 4, c. 42, s. 30, for the time that execution had been delayed by the writ of error. [*Tindal, C. J.*—We certainly should not be disposed to give it in such a case as this, where so much doubt has existed.] The statute is imperative, and leaves the Court no discretion: the words are—“if any person shall sue out any writ of error upon any judgment whatever, given in any Court in any action personal, and the Court of Error shall give judgment for the defendant therein, then interest *shall be* allowed by the Court of Error, for the delaying thereof.” On the other hand, the 29th section, which enables the jury to give interest, says that they “may, if they shall think fit, give damages in the nature of interest,” in certain actions therein mentioned. The difference of expression in the two clauses shews that

(a) 3 B. & Adol. 114.

(b) 1 M. & W. 101.

(c) 8 C. & P. 163.

under the former the Court has no discretion. Previously to the statute, the practice of the Courts, with respect to the allowance of interest on judgments in this Court, was not uniform: see *Sheppard v. Mackreth* (a), *Saxelby v. Moore* (b), *Walter v. Bayley* (c). The object of the act was to establish a general and uniform rule.

Exch. Chamber,
1838.

LEVY
v.
LANGRIDGE.

Lord DENMAN, C. J.—We think interest must be allowed, under this clause of the act of Parliament, to the defendant in error.

Judgment affirmed, with interest at
four per cent.

(a) 2 H. BL. 284.

(b) 3 Taunt. 51.

(c) 2 Bos. & P. 219.

(*In Error from the Court of Exchequer.*)

KIRKMAN and Another, Executor of JOSEPH KIRKMAN,
deceased, v. SIBONI.

THE bill of exceptions tendered to the summing up of the learned judge (*Parke*, B.) on the second trial of this cause (a), having been sealed, a writ of error was brought.

The lapse of twenty years from the time of making a contract to be performed in futuro, is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract.

The bill of exceptions set forth (inter alia) the evidence of Caroline Stokes, the daughter of the testator Joseph Kirkman, who gave a vague account of the delivery by him to the plaintiff of a piano-forte, in exchange for, or at least subsequently to the plaintiff's delivery to him of, that which was the subject of the agreement.

The case was now argued by *Kelly* for the plaintiff in error, and by *Martin* for the defendant in error. The argument as to the effect of the lapse of time was substantially the same as that urged in the Court below, on the motion for a new trial.

(a) See 1 M. & W. 422.

Exch. Chamber,
1838.

KIRKMAN
v.
SIBONI.

LORD DENMAN, C. J.—The Court considers that the plea is in substance a plea of performance, and that the lapse of time does not of itself furnish any evidence in support of it; but it is difficult to say that there was evidence to go to the jury, upon the statement of witness Stokes. We think that evidence, although certainly very slight, ought to have been submitted to the jury: that it was for them, having seen the witness and heard her evidence, to judge of the effect of it. There must therefore be a venire de novo, unless the parties can come to some arrangement.

Venire de novo

NOTE.

WHEN the case of *Cursham v. Newland*, (ante, p. 101) was printed, the Reporters had not been able to obtain a copy of the certificate sent by this Court to the Master of the Rolls. As it differs in some degree from that given by the Court of Common Pleas, and appears to be of importance to the right understanding of the effect of the case, it is subjoined here:—

“WE have heard this case argued by counsel, and considered it; and we are of opinion, that the testator's son and daughters took estates for their respective lives in remainder after the death of the testator's widow, tenants in common, in the freehold and copyhold lands devised by the residuary clause, with contingent remainders in their respective shares to their respective children, by purchase, as tenants in common in tail, with cross remainders in tail between such children in such respective shares; with cross remainders over in the whole of each of such shares respectively, on failure of all the children of any one son or daughter, and their issue, to

the survivors or survivor of the testator's sons or daughters for life, remainder in tail general to the children of [each] such surviving son or daughter respectively, in like manner as in the original share given to such son or daughter respectively; and that the sons and daughters, and their children respectively, took corresponding interests in the leaseholds, by way of executory bequest. Dated this 5th day of June, 1838.

Exch. of Pleas,
1838.

" ABINGER

" J. PARKE.

" W. BOLLAND.

" J. GURNEY."

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

MICHAELMAS TERM, 2 VICTORIÆ.

REGULA GENERALIS.

Exch. of Pleas,
1838.

WHEREAS it is provided by the act of the 1 & 2 Vict. c. 45, s. 3, that, after the 1st of November, 1838, any person entitled to be admitted an attorney of any of the superior Courts of common law at Westminster, shall, after being sworn in and admitted as an attorney of any one of the said Courts, be entitled to practice in any other of the said Courts, upon signing the roll of such Court, and not otherwise, in like manner as if he had been sworn in and admitted an attorney of such Court; provided that no additional fee besides those payable under an act of 1 Vict. c. 56, shall be demanded or paid; and that the fees payable for such admission shall be apportioned in such manner as the judges of the said courts, or any

eight of them, shall, by any rule or order made in term or vacation, direct and appoint. *Arch. of Pleas,*
1838.

We therefore direct and appoint that the fees payable by virtue of the said last-mentioned act for the judge's fiat, be received in the first instance by the clerk of the judge granting the fiat, and paid over by him to the clerk of the Chief Justice or Chief Baron of the Court, as the case may be; and the day after each term, all the fees so received shall be divided into fifteen portions, one of which shall be paid to the clerk or clerks of each judge; and further, that the fees payable by virtue of the said act to the ushers, shall be received in the first instance by one of the ushers of the Court in which the admission shall take place, and shall, on the day after each term, be divided into three equal portions, one of which shall be paid to the ushers of each Court.

[Signed by all the judges except BOLLAND, B.]

SAINSBURY v. MATTHEWS.

ASSUMPSIT.—The declaration (as originally framed) stated, that on the 29th day of June, 1836, it was agreed by and between the plaintiff and the defendant, that the plaintiff should buy, and he did then buy, of the defendant, and that the defendant should sell, and he did then sell, to the plaintiff, [a certain large quantity of potatoes, to wit, the produce of about 100 lug of land, at the price of 2s. per sack, to be delivered by the defendant to the plaintiff within a reasonable time in that behalf, and to be

The defendant, in the month of June, agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2s. per sack, the plaintiff to have them at digging up time (October), and to find diggers:—

Held, that this was not a contract for the sale of an interest in land, within the 4th section of the Statute of Frauds.

The declaration, as originally framed, stated the contract to be to deliver the potatoes *within a reasonable time*, to be paid for on delivery. The pleas were non assumpsit, and that the contract had been rescinded by consent, on which latter plea there was conflicting evidence. The Judge at Nisi Prius having, on the application of the plaintiff, directed the declaration to be amended so as to make it conformable with the contract as above stated, the Court refused a new trial, no affidavit being produced to shew that the defendant had been prejudiced by the amendment.

Exch. of Pleas,
1838.

SAINSBURY
v.
MATTHEWS.

paid for by the plaintiff to the defendant on the delivery thereof as aforesaid.] The declaration, after averring mutual promises, then alleged that, ever since the making of the agreement, the plaintiff had been ready and willing [to receive the said potatoes at the price aforesaid, and to pay for the same on delivery, at the rate and price aforesaid, of all which the defendant always had notice, and heretofore, and after the making of the said agreement and promises, and before the commencement of this suit, to wit, on the 4th day of July, 1837, was required by the plaintiff to deliver to him the said potatoes at the price aforesaid; and a reasonable time for delivery thereof elapsed long before the commencement of this suit: yet the defendant, not regarding &c., did not within a reasonable time, and hath not at any time since the making of the said agreement, delivered, or tendered and offered to deliver, to the plaintiff, the said potatoes or any part thereof, whereby &c.]

Pleas, first, non assumpsit; secondly, that before breach of the agreement it was rescinded by consent of both parties; on which issues were joined.

At the trial before *Coltman, J.*, at the last Wiltshire assizes, it was proved that the plaintiff and defendant being together at an inn at Erlstoke, in June, 1836, the defendant said he had got 100 lugs of potatoes, and he would sell them at 2s. a sack. The plaintiff said he would have them; and it was agreed that the plaintiff was to have them at that price at digging up time, and that he should find diggers. When the potatoes were ripe, the plaintiff accordingly sent diggers to take them up, but the defendant refused to permit them to do so. There was conflicting evidence on the question whether the agreement had been previously rescinded. It was objected for the defendant, that there was a variance between the declaration and the evidence, inasmuch as the former stated the contract to be that the potatoes were to be

Delivered within a reasonable time, and to be paid for on delivery. The plaintiff's counsel applied to the learned judge to amend the declaration so as to make it conformable to the contract proved, and he directed an amendment accordingly. The declaration having been amended, the parts included within brackets then stood as follows:

[a certain large quantity of potatoes, then planted and being in certain land of the defendant, at the price of 2s. per sack, the same to be dug by the plaintiff at the usual time for digging the same, and to be paid for by the plaintiff to the defendant at the said last-mentioned time.]

Exch. of Pleas,
1838.

SAINSBURY
v.
MATTHEWS.

[to receive, take, and dig the said potatoes, and to pay for the same at the said rate and price, and at the time last aforesaid, of all which the defendant always had notice, and heretofore, and after the making of the said agreement and promises, and before the commencement of this suit, to wit, on the 30th day of October, 1836, the same being the usual time for digging the said potatoes, the defendant was required by the plaintiff to permit and suffer him to dig and take the said potatoes; yet the defendant, not regarding &c., did not, nor would then, nor at any time since permit and suffer the plaintiff to dig and take the said potatoes, or any part thereof, but on the contrary thereof, wholly refused so to do (the same land being then in the possession of the defendant), whereby &c.]

The jury having found for the plaintiff on both issues, damages 5*l.* 10*s.*,

Crowder now moved, pursuant to leave reserved by the learned judge, to enter a nonsuit, on the ground that this was the sale of an interest in land, within the 4th section of the Statute of Frauds, and therefore required a note or memorandum in writing; or for a new trial, on the ground that the amendment ought not to have been made.—First, this was a contract for the sale of an interest in land. The potatoes were not in such a shape, at the time of the contract,

Exch. of Pleas,
1838.

SAINSBURY
v.
MATTHEWS.

as that they could be transferred as chattels; they were to be taken up when ripe by the vendee; and he must necessarily have the benefit of the land for the three intervening months. [*Parke, B.*—He was not to have them until he dug them up. Suppose a tempest had destroyed them in the mean time, whose would the loss have been? It is only a contract to sell at a future day so many sacks of potatoes, the produce of certain land.] In *Parker v. Staniland (a)*, a similar contract for the sale of growing potatoes, at so much a sack, was held not to be a sale of an interest in land, on the express ground that they were to be taken up by the defendant *immediately*, and it was therefore quite accidental if they derived any further advantage from being in the land. *Evans v. Roberts (b)* is distinguished by the circumstance that there the potatoes were to be raised by the vendor for the vendee. The distinction taken in that case between crops which would be emblements, and the ordinary annual produce of land, appears hardly to be maintainable. In *Earl of Falmouth v. Thomas (c)*, it was held that a contract to let with a farm certain growing crops upon it, at a valuation, was a contract for the sale of an interest in land. In *Carrington v. Roots (d)*, the same was held with respect to a contract for the sale of a growing crop of grass, with liberty to the buyer to go upon the land to cut and carry it away.

Secondly, this amendment ought not to have been made. It introduced on the record an entirely different contract, and one which the defendant has never had an opportunity of answering.

LORD ABINGER, C. B.—The power of amendment given by the statute vests a wide discretion in the judge; if he exercises it to the best of his information at the time, and

(a) 11 East, 362.

(b) 5 B. & Cr. 829.

(c) 1 C. & M. 89.

(d) 2 M. & W. 248.

does not plainly appear to have been wrong, the Court will not interfere. Here no affidavit is produced to shew that the defendant has been prejudiced by the amendment.

Exch. of Pleas,
1838.

SAINSBURY
v.
MATTHEWS.

As to the first point, I think this was not a contract giving an interest in the land : it is only a contract to sell potatoes at so much a sack on a future day, to be taken up at the expense of the vendee. He must give notice to the defendant for that purpose, and cannot come upon the land when he pleases.

PARKE, B.—This is a contract for the sale of goods and chattels at a future day, the produce of certain land, and to be taken away at a certain time. It gives no right to the land : if a tempest had destroyed the crop in the meantime, and there had been none to deliver, the loss would clearly have fallen upon the defendant. The case is stronger than that of *Evans v. Roberts*, because here there is only a stipulation to pay so much per sack for the potatoes when delivered : it is only a contract for goods to be sold and delivered. In that case all the authorities were reviewed, and the result of them clearly laid down.

As to the amendment, I quite concur in the propriety of it. Unless the Judges are very liberal in the allowance of amendments, the rule which binds a plaintiff to one count will operate very harshly.

GURNEY, B., concurred.

Rule refused.

Exch. of Pleas,
1838.

MOGG and Another, Assignees of PURNELL, an Insolvent Debtor, v. BAKER.

Where a conveyance or transfer of goods is made by a party in insolvent circumstances to a creditor, in pursuance of a bona fide demand by the creditor, it is not voluntary within the meaning of the 7 Geo. 4, c. 57, s. 32; it is not necessary, in order to support it, that there should have been pressure on the part of the creditor, or an apprehension on the part of the insolvent that by not making it he should be in a worse condition.

THE reference recommended by the Court in this case (a) not having been assented to by the parties, the cause was tried again before *Parke, B.*, at the last Bristol Assizes, when it appeared, that in the assignment by the insolvent Purnell to the defendant was included not only the furniture, of the value of 170*l.*, in respect of which an agreement was made between the insolvent and the defendant in 1835, but also other furniture, subsequently purchased by the insolvent, (partly with money lent him by the defendant), of the value of 35*l.*, and which, it was admitted, was not included in the original agreement. With respect to this latter amount, therefore, the only question was, whether the assignment was a voluntary conveyance or transfer of these goods, within the meaning of the 32nd section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57. The examination of the defendant, on the hearing of Purnell in the Insolvent Debtors' Court, was put in, in which the defendant stated that Purnell "offered him security spontaneously."

The learned Judge, in summing up, directed the jury, with reference to the furniture included in the agreement, in conformity with the opinion expressed by him in banc; and as to the other, he left it to them to say whether the assignment originated with the insolvent to the defendant, as a favoured creditor, or whether it originated in the request of the defendant; he told them that pressure of the creditor was not necessary; but that if it originated with the insolvent, it could only have been made by way of voluntary preference. The jury found a verdict for the defendant.

Crowder now moved for a new trial, on the ground of misdirection.—It is submitted that the test applied by

(a) See 3 M. & W. 198.

the learned Judge is too narrow a one, and that something more must be shewn, in order to establish that a transfer is not voluntary within the statute, than a creditor's merely *asking the debtor for a security*. All the authorities lay it down that there must be something in the nature of importunity or pressure. The case depends on the same principles, in this respect, as those which determine whether a preference is voluntary within the Bankrupt Act: the question is, whether an intention is shewn that one creditor shall be preferred to the general body. In *Cook v. Rogers* (a), it was held to be a proper test to be submitted to the jury, to consider what was passing in the bankrupt's mind at the time of the alleged voluntary payment, and the motives by which he was probably influenced. *Tindal, C. J.*, says—"I am not able to perceive any mode of ascertaining whether the payment and the delivery of the bill in this case were such as the law protects, or such as the law avoids, but by putting it to the jury to say, whether the payment were made in contemplation of bankruptcy, *and under fear of compulsion*, or voluntarily." So here, the jury should have been asked whether there was pressure, or fear of compulsion. In *Arnell v. Bean* (b), again, it appears to be assumed that some kind of pressure—something beyond a mere request—must be proved. It ought to appear that the bankrupt or insolvent is under an apprehension that he will be in a worse condition if he abstains from doing the act: if he is perfectly ready to do it when asked, it is voluntary. It is not necessary that there should be a fraud whereby he should himself benefit; it is a fraud on the general body of the creditors, if the act, whereby one creditor obtains an advantage, is done of his own free will. [*Parke, B.*, referred to *Doe v. Gillett* (c).] In *Reynard v. Robinson* (d),

Exch. of Pleas,
1838.

Mogg
v.
BAKER.

(a) 7 Bing. 439.

(c) 2 C. M. & R. 579.

(b) 8 Bing. 87; 1 M. & Scott,
151.

(d) 9 Bing. 717; 3 M. & Scott,
127.

Exch. of Pleas,
1838.

Mogg
v.
BAKER.

the payment was held not be voluntary, on the ground that it was made in consequence of a threat of legal proceedings. [Lord *Abinger*, C. B.—Because, in the particular case, there was something beyond a mere demand, which is noticed in the judgment, does it therefore follow that a threat was necessary? The current of authorities is the other way, and the constant practice at *Nisi Prius* has been, that a demand by the creditor is sufficient.] If the law be so broadly laid down, it may open a door to the grossest frauds. [He moved also on the ground that the verdict was against the evidence.]

LORD ABINGER, C. B.—I am of opinion that the verdict was right, and the direction right. There is a fact in the case which seems to have escaped Mr. *Crowder's* attention, which is, that *Purnell* said he executed the bill of sale, because he apprehended, if he did not, *Baker* would put in a distress. I do not however think this was necessary; and I should be sorry to have it understood I thought it essential. I think, if a demand is made by a creditor *bonâ fide*, and a transfer takes place in pursuance of that demand, that takes it out of the case of voluntary transfer contemplated by the Insolvent Act. Therefore I think the direction of the learned Judge was right, and the verdict of the jury right, and that there is no ground for granting the rule.

PARKE, B.—I certainly laid down the law to the jury as I understood it long ago settled to be; as to the verdict, I might have concurred in it either way; if the jury had found their verdict the other way, I should have been satisfied,—but I cannot say it was wrong.

GURNEY, B.—I quite concur that the direction of the learned Judge was correct, and I also think the verdict was right.

Rule refused.

LARCHIN v. WILLAN.

BUTT moved for a rule to shew cause why an order made by *Gurney, B.*, under the 1 & 2 Vict. c. 110, s. 3, for arresting the defendant, should not be set aside, and why the bail-bond given in pursuance thereof should not be delivered up to be cancelled. It appeared from the affidavits, that the defendant had been arrested on a writ of *capias ad respondendum* at the suit of the plaintiff, previously to the 1st of October last. On that day, the plaintiff made an *ex parte* application to a judge for an order to detain him under the new statute, on an affidavit that the defendant was an officer in the army, that his regiment was stationed in Ireland, and that he (the plaintiff) believed the defendant was about to leave this country. The defendant at the same time took out a summons to shew cause why he should not be discharged, on an affidavit stating that he was a captain in the 17th Foot, that his regiment was abroad, that he was in this country on official business, and had no intention of going abroad with a view of avoiding the payment of his debts, but was going into Ireland in obedience to the commands of his superiors, and in pursuance of his duty, &c. These two summonses came on to be heard together before *Coltman, J.*, who, after conferring with *Tindal, C. J.* held the explanation given in the defendant's affidavit to be sufficient, and directed his discharge. The order for his arrest was however subsequently made by *Gurney, B.*, and a bail-bond taken.

The principle by which the Judges will be guided in allowing an arrest under the 1 & 2 Vict. c. 110, s. 3, is to consider whether the defendant is about to leave the country for such a time that he is not likely to be forthcoming to satisfy the plaintiff's execution at the period when he will be entitled to it in the ordinary course of law proceedings.

It was therefore held to be a sufficient ground for issuing the writ, that the defendant, an officer in the army, was about to join his regiment stationed abroad.

Butt contended that the proper construction of the 1 & 2 Vict. c. 110, s. 3, was, that, in order to justify an arrest, the defendant be must about to leave England with the intention of avoiding arrest: the bare assertion that he was about to leave the country for a short time, in pursuance of his duty, or in discharge of his business,

Exch. of Pleas,
1838.

LARCHIN
v.
WILLAN.

could not be considered sufficient to justify his detention. The act ought to be construed liberally. The defendant, although not now in actual custody, was in the custody of his bail, and the Court of Common Pleas had decided, in a case of *Bateman v. Dunn* (a), that in such cases, by the equitable construction of this statute, the bail were entitled to have an exoneretur entered on the bail-piece.

PARKE, B.—I think you are not entitled to a rule. It appears on your own affidavit, that the defendant is about to proceed to Ireland for the purpose of joining his regiment; and I think the proper construction of the statute is, that any party about to leave the kingdom, unless it be for some very temporary purpose, and it appears that he is intending to return, so that the plaintiff may be able to obtain the fruits of his judgment, is within the meaning of this section. I should have been disposed to grant the rule out of respect to the decision of my Brother *Coltman*, and which he said took place after a communication with the Chief Justice: but I have communicated with him while this case was going on, and his answer is, that his decision did take place after conversing with the Chief Justice upon it, but he also says he was disposed to think otherwise himself, and he now thinks the case was sufficient to justify the arrest. We are now, therefore, at liberty to act in the matter on our own judgment, and I must own the case seems to me to be precisely within the words of the act of Parliament.

ALDERSON, B.—I entirely agree. The principle is this; that if the party is only going to leave England for a short time, the case does not come within the statute; but if he be going for such a purpose, or for such a length of time, as that he is not likely to be forthcoming when the plaintiff, by the ordinary course of law proceedings, would be

(a) Not yet reported.

entitled to judgment, and to have his body in execution, he has a right to prevent his departure. Suppose the defendant were going to join his regiment in Ireland, and the practice of the army were for all regiments to remain there two years, and then be sent abroad on foreign service, can it be said that case would not be a proper one for the interference of the judge? This section of the statute arose out of the provisions applicable for holding to bail before the statute, in cases where the parties could not be held to bail by the mere will of the plaintiff: and the rule made was, as I always understood it, that a party was to be subject to arrest in those cases, by the discretion of the Judge, that he might be forthcoming in order to be taken in execution, if it should be ultimately decided that an execution should go against him. The same principle ought to be followed in the administration of this statute, in the cases in which it has not taken away the right of arrest: it seems to be a plain principle to go upon, and it decides the case against Mr. *Butt*. The discretion given to the Judge is certainly large, and one would interpret the clause liberally, if a man were coming back in any reasonable time.

Each. of Pleas,
1838.

LARCHIN
v.
WILLAN.

GURNEY, B., concurred.

Rule refused.

JACKSON v. COOPER.

S*H***E***E* had obtained a rule, under the 1 & 2 Vict. c. 110, s. 7, calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a common appearance, and why thereupon all proceedings on the bail-bond which had been taken in this case should not be stayed,

Where a defendant was arrested on mesne process before the 1st October, 1838, and gave a bail-bond; and after that day final judgment was signed

against him, and a ca. sa. issued and lodged with the sheriff, in order to fix the bail; the Court refused to exonerate the bail, on an equitable construction of the 1 & 2 Vict. c. 110, s. 7.

Exch. of Pleas,
1838.

JACKSON
v.
COOPER.

and an exoneretur entered on the bail-piece. The defendant had been arrested on mesne process before the 1st October, and had given a bail-bond; on the 5th November final judgment was signed, and a ca. sa. was issued and lodged with the sheriff.

Gurney shewed cause (November 13th).—As soon as the ca. sa. was lodged with the sheriff, the defendant was no longer in custody on mesne process. He ought to have applied earlier. The 7th section of the act applies, in terms, only to such persons as should be prisoners in actual custody on mesne process on the 1st October, and should apply for their discharge as such. Here final judgment has been signed, and if the defendant renders in discharge of his bail, he must remain in custody.

Shee, contra.—The sole object of this application is to avoid the expense of a render: it has been held by the Court of Common Pleas, in *Bateman v. Dunn*, that when the party has been arrested on mesne process, and has given bail previously to the 1st October, an exoneretur may be entered on the bail-piece, in order to avoid the circuitry and expense of rendering a defendant, who, immediately upon his render, would be entitled to be discharged again under the statute. This defendant is still in custody on mesne and not on final process: the ca. sa. is not yet returnable, the eight days not having elapsed, and the 3 & 4 Will. 4, c. 42, s. 9, does not apply to the case of return of process for the purpose of fixing the bail; *Kemp v. Hyslop* (a). The custody on mesne process does not cease until the bail are bound to render the defendant. But the real question for consideration is, not what is the defendant's position now, but what it was on the 1st October, final judgment not having been signed until

(a) 1 M. & W. 58.

the statute had come into operation. The question here is in relief of the bail, and they are entitled to relief if the defendant was in custody on mesne process at the time of the passing of the act.

Cur. adv. vult. (a).

HARRISON v. DICKENSON.

CORRIE had obtained a rule calling on the plaintiff to shew cause why two several sums of 95*l.* and 10*l.* paid into Court by the defendant in lieu of bail and for costs, under the 7 & 8 G. 4, c. 71, s. 3, should not be paid out to him, on his entering a common appearance. The defendant was arrested on a *capias ad respondendum* on the 4th of September, and deposited with the sheriff the sum of 85*l.* in lieu of bail, and 10*l.* for costs; on the 21st of September, he obtained an order for leave to add a further sum of 10*l.*, which was accordingly done. The whole sum having been paid into Court, a common appearance was entered, and a declaration delivered; after which, all further proceedings were stayed by the order of a Judge. The present application was made as an equitable interpretation of the 1 & 2 Vict. c. 110, s. 7, on the ground that the deposit of money in lieu of bail was equivalent to perfecting bail, or to a render.

Exch. of Pleas,
1838.

JACKSON
v.
COOPER.

Where a defendant was arrested on mesne process before the 1st October, 1838, and deposited a sum of money in lieu of bail and for costs, which was paid into court, under the 7 & 8 Geo. 4, c. 71, s. 3:—*Held*, that he was not entitled to have the money paid out to him after the 1st October, on an equitable construction of the 1 & 2 Vict. c. 110, s. 7.

Petersdorff shewed cause.—It is impossible that the 7th section of the act can apply to this case. It is clear, from the terms of it, that it was intended to apply only to the case of parties who are in the actual and physical control either of the Court or of their bail. That is clearly shewn by the proviso excepting parties who have petitioned the Insolvent Debtors' Court before the passing of the act; since no petition will be received by that Court from parties not in actual custody. In the whole of the argument in *Bateman v. Dunn*, it was assumed that the bail

(a) See the next case.

Exch. of Pleas,
1838.

HARRISON
v.
DICKENSON.

have continued to have the dominion over the defendant. [Alderson, B.—We have spoken to the Judges of the Common Pleas relative to their decision in that case, and it appears that they only meant to decide, that if a party had been held to bail before the 1st of October, they would hold him to be a prisoner in custody at the commencement of the act, by relation, although he was then out on bail, and was afterwards rendered; and therefore, in the exercise of their discretion, would relieve him or his bail on motion, although *not* rendered, in order to avoid the useless expense of going into prison and coming out again. The difficulty, however, with me is, that when the Court thus permits an imaginary render to stand in the place of a real one, it is possible that great injustice may be done to the plaintiff; because if an actual render took place, the plaintiff might forthwith charge the defendant in execution: so that by preventing circuitry, we may do injustice. How can we put the plaintiff in the same situation?—the defendant may in the mean time leave the country altogether.] It appears, moreover, that here an appearance has been entered; so that the defendant cannot comply with the terms of the 7th section.

Corrie, in support of the rule.—The defendant is entitled to this rule, under the equitable construction of the statute. Under the 7 & 8 G. 4, c. 71, s. 3, he would be entitled to take this money out of Court on perfecting bail: so also on rendering—the one is a mere substitute for the other; *Harford v. Harris* (a): if, therefore, he is in a condition to be rendered to prison, whence he would immediately be discharged, the money ought not to be retained. The important clause in the decision of this case is not the 7th, but the 1st, by which it is enacted, that *no person*, after the 1st day of October, shall be arrested on *memorandum* process, except in the cases afterwards provided for—i. e.

(a) 4 Taunt. 669.

by s. 3. This is a statute of a highly remedial nature, and the Court will do all that fair construction will permit to carry out its intent. The 1st section ought, therefore, to be read as enacting that no person shall, after that day, be *detained* in custody on mesne process. There are various authorities to shew that an arrest means either a taking, or a subsequent detainer. [*Alderson, B.*—I presume that the persons who are meant to be liberated under s. 7, are the same persons who may be detained under s. 3. Now what power would a Judge have to detain this defendant, although it were clear that he would go abroad immediately? At the time the act passed, he was not liable to arrest.] Even if there is no power to order the detention of the defendant in such a case, that is only a *casus omis-
sus* in favour of prisoners.

Arch. of Pleas,
1838.

HARRISON
*
DICKENSON.

PARKE, B.—This is certainly an embarrassing case; the whole difficulty has arisen from departing from the strict words of the statute. We are, however, bound by the judgment of the Court of Common Pleas, and we must therefore consult the Judges of that Court to see the full extent of their decision on the subject.

Cur. adv. vult.

On the following day,

PARKE, B., said,—There were two cases of *Jackson v. Cooper*, and *Harrison v. Dickenson*, applications arising out of the late act of Parliament, the 1 & 2 Vict. c. 110, ss. 1 & 7, which stood over in order that we might have an opportunity of conferring with the Judges of the Court of Common Pleas, with a view to an uniformity of decision as to the construction of that act. In the former case, an application was made to enter an *exoneretur* on the bail-piece, the defendant being out on bail above 20*l.*, and a *ca. ss.* having been sued out to fix the bail. In the other case, the defendant himself applied to have a sum of money, which he had paid into Court before the 1st of October, returned to him, he being ready to put in

Exch. of Pleas,
1838.

HARRISON
v.
DICKENSON.

bail now, and to render himself into custody, in order to take the opinion of the Court whether he ought to be discharged, and to have his money returned to him. The sections of the act on which these applications were made, are the 1st and 7th. The 1st section provides, "That from and after the time appointed for the commencement of this act, no person shall be arrested upon mesne process in any civil action in any superior court whatever, except in those cases and in the manner hereafter provided for." No one can be arrested or held to bail on mesne process, therefore, after the commencement of the act; but parties already in custody are not to be discharged under the first section. The question then arises whether either of these parties is so entitled under the first section. That section provides, "That every person who at the time appointed for the commencement of this act shall be in custody upon mesne process for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of solvent debtors, shall be entitled to his discharge, upon entering a common appearance to the action: Provided nevertheless, that every such prisoner shall be liable to be detained, or after such discharge to be again arrested, by virtue of any such special order as aforesaid, at the suit of the plaintiff, at whose suit he was previously arrested, or of any other plaintiff." The Court of Common Pleas have put a liberal construction on this section, in order to carry into effect the principle of the act; and have held that the party need not be in actual custody when the act comes into operation; it is sufficient if at the time of his applying to be discharged he is a prisoner in some sense of the word; for which reason they have discharged those persons who on the 1st of October were out on bail, having been previously arrested on mesne process and have entered an exoneretur on the bail-piece, in order to save the parties the circuitous and expensive process of surrendering in discharge of their bail, and then making

an application under the act to be discharged; and this practice has been generally adopted at chambers. But that decision cannot be considered as at all applying to the second of the cases before us, in which the defendant has paid money into Court in lieu of bail; he cannot in any sense be considered as having been in actual custody, and therefore cannot entitle himself to relief under the 7th section; for although a man, by the equity of the statute, may be said to be in the custody of his bail, he cannot be said to be in the custody of his money. The rule, therefore, which had been obtained by Mr. *Corrie*, and which was argued yesterday, must be discharged. And in the other case, we cannot relieve the bail *per saltum*, in the manner which has been suggested, as if the defendant had rendered; we do not know that the defendant is in such a position as that his bail may have it in their power to render him at all; and if he were rendered, though he would still, in the first instance, be in custody on a writ of mesne process, yet as final judgment has been signed, and a *capias ad satisfaciendum* issued against him, he might be immediately charged in execution, and thus placed in actual custody on final process. We cannot, therefore, in this case, give the relief applied for; and both rules must be discharged, but without costs.

Exch. of Pleas,
1838.

HARRISON
v.
DICKENSON.

Rules discharged, without costs.

NYAS v. MILTON.

W. H. WATSON moved to discharge the defendant out of custody, under the recent act for abolishing arrest on mesne process, 1 & 2 Vict. c. 110, s. 7. It appeared from the affidavits, that the defendant had been arrested

Where a defendant was arrested on mesne process previously to the passing of the statute 1 & 2 Vict. c. 110, but

escaped from custody, and was retaken under an escape warrant after the act came into operation: —Held, that he did not come within the 7th section, as being in custody at the commencement of the act, or within the 1st section, as having been arrested on mesne process after the act came into operation, and that he was not entitled to his discharge.

Exch. of Pleas,
1838.

NYAS
v.
MILTON.

on a writ of *capias* in the month of May last, but having made his escape, an escape warrant was issued against him, dated the 29th of May, by virtue of which he was re-taken the day before this motion was made, and consequently after the 1st of October last, when the above act came into operation.—He contended that, although this was rather a peculiar case, it came within the provision of the 7th section of the 1 & 2 Vict. c. 110, by which “every prisoner who, at the time appointed for the commencement of this act, shall be in custody upon *mesne* process, for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge, upon entering a common appearance to the action.” If the prisoner had remained in custody from the time he was first taken, it is clear that he would have been in custody on *mesne* process; and when he was re-taken, it amounted to a continuing custody. Either was a continuing custody, or it was a fresh arrest on *mesne* process, and comes within the first section.

PARKE, B.—I am of opinion that this defendant is entitled to relief under the act. It cannot be said, in view of the case, that he was in custody on the 1st October, and therefore, he does not come within the 7th section of the act. Then the question is, whether it comes within the 1st section, which provides, that after the time appointed for the commencement of the act, no person shall be arrested on *mesne* process in any civil action. We think that he does not. His being out of custody on the 1st of October was by his own default and unlawful conduct, in not remaining in prison when legally arrested. And his being taken on the escape warrant cannot be said to be an arrest on *mesne* process since the commencement of the act.

The rest of the Court concurred.

Rule refused.

Exch. of Pleas,
1838.LEWIS *v.* FORD.

ARCHBOLD had obtained a rule to shew cause why an exoneretur should not be entered on the bail-piece, the defendant having been arrested and given bail previously to the 1st of October.

Whereas defendant, who was arrested on mesne process, and gave bail, before the 1st October, 1838, immediately on his discharge went and still remained abroad, the Court refused to enter an exoneretur on the bail-piece.

Humfrey shewed cause on an affidavit which stated that the defendant had left this country immediately on his release from the arrest, and that the deponent believed he intended to remain abroad, and not to return.

PER CURIAM.—The defendant having, by going abroad, removed himself altogether out of the jurisdiction of the Court, we cannot interfere to exonerate his bail.

Rule discharged, with costs.

COPPOCK *v.* BOWER.

DEBT for money lent, and on an account stated, in the sum of 500*l.* Pleas, first, *nunquam indebitatus*; secondly, as to 500*l.*, *parcel &c.*, *actionem non*, because, before the making of the agreement hereinafter mentioned, at a certain election holden at Maidstone of a burgess to serve in Parliament for that borough, one J. M. Fector had been by the returning officer declared duly elected and returned as such burgess, and against such election and return a certain petition had been thereupon presented by certain electors of the said borough to the Commons House of Parliament, alleging that the said J. M. Fector had been guilty of bribery and corruption and other illegal practices

A petition having been presented to the House of Commons against the return of a member, on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition:—*Held*, that this agreement was

illegal—*Held*, also, that the written agreement was admissible in evidence, for the purpose of insisting on the illegality of the transaction, in answer to an action for the sum so agreed to be paid, without its being stamped.

CASES IN THE EXCHEQUER,

the said election, and that the return of J. M. Fector
been obtained by *bribery*, treating, and other illegal
tices, and praying that the said election and return
be declared null and void; which said petition, at t
of the making of the said agreement hereinaft
tioned, was pending, the presentation thereof be
fided by the said petitioners to the care and ma
of the plaintiff as their agent: and thereupon, a
the stating of the account in the declaration me
was corruptly and unlawfully agreed by and t
plaintiff, as such agent, and the defendant, a
fendant should pay to the plaintiff, within a
the sum of 500*l.*, and procure J. M. Fector a
sent that his election and return should be
and void, as to promise that in the event
election of members to serve in Parliam
second vacancy occurring in the represent
borough, he the said J. M. Fector, woul
himself or through any of his friends,
coalition with any other candidate, oppo
return of one A. W. Roberts as one
the said borough, if the same person
candidate to represent the said boroug
sideration of the premises, the said cl
corruption, and other illegal practice
contained, should be no further pros
J. M. Fector: and upon his electio
clared null and void, and the said
proposed as a candidate for the sai
didate should be procured, or assi
said plaintiff to oppose the retur
new election, and in the event
should be presented against su
using his best endeavours to p
be holden within four days af
should be received by the

Exch. of Pleas,
1838.

COPPICK
v.
BOWER.

borough. And the defendant further says, that the said account so stated between the plaintiff and him the defendant, as to the sum of 500*l.*, parcel &c. was stated of and concerning the sum of 500*l.* so corruptly and unlawfully agreed to be paid as aforesaid, and of and concerning no other sum, and the same by reason of the premises was a corrupt and unlawful account, and was and is wholly void. Replication to the second plea, that it was not corruptly and unlawfully agreed between the plaintiff as such agent as in that plea mentioned, and the defendant, in manner and form &c., nor was the said account stated between the plaintiff and defendant as to the said sum of 500*l.*, parcel &c., stated of and concerning the said supposed sum of 500*l.*, alleged to have been so corruptly and unlawfully agreed to be paid as in the plea mentioned.

At the trial before *Patteson, J.*, at the last assizes for the county of Kent, the plaintiff produced in evidence in support of his case, an I. O. U. for 500*l.* signed by the defendant. The defendant tendered in evidence three unstamped papers, which, together with the I. O. U., it was alleged, constituted the agreement set forth in the second plea. It was objected, on the part of the plaintiff, that these papers were inadmissible to prove the agreement, as not being stamped; but the learned Judge overruled the objection, and received them in evidence, and left it to the jury to say whether they proved the agreement as pleaded, and that if they thought so, he was of opinion that the agreement was illegal. The jury having found in the affirmative, the learned Judge directed a verdict to be entered for the defendant on the second issue.

Law now moved for a new trial, on the ground that these papers, not being stamped, were not admissible, and ought not to have been received in evidence; or for judgment non obstante veredicto, on the ground that the agreement, as set forth in the plea, was not illegal. First, these papers were

Exch. of Pleas,
1838.

COPPOCK
v.
BOWER.

not admissible without a stamp. They were offered in evidence, not for a collateral purpose, but to prove an agreement expressly relied upon by the plea. There are a variety of cases engrafting exceptions on the stamp laws, but this is not one of them. Thus, in the case of forgery, an unstamped instrument is admissible to prove the forgery; *Rea v. Pooley* (a): but there the purpose is collateral. So in the case of an unstamped agreement put in for the purpose of proving usury, the purpose is collateral; *Nash v. Duncombe* (b); or in the case of an illegal policy of insurance on a lottery risk, as in *Holland v. Duffin* (c). It is also to be observed, as to the admissibility of an unstamped instrument in the case of usury, that the stat. 12 Anne, st. 2, c. 16, s. 1, in its terms, contemplates offences arising out of the use of unstamped instruments, amongst other means spoken of, and by fair intendment may be taken to authorize the reception in evidence of instruments of that nature. The cases on this subject are collected in 2 Stark. on Ev. 772; and he says,—“In general, an unstamped instrument cannot be read in a criminal case as evidence for the purpose for which it was intended. Thus, on an indictment for setting fire to a house with intent to defraud an insurer, an unstamped policy is not admissible in evidence to prove the contract of insurance: *Rex v. Gibson* (d). And upon an indictment against a clerk for embezzling his master's money, it has been held that an unstamped receipt given by the servant to the debtor who paid him the money, was not evidence against the prisoner” (e). In *Whitwell v. Dimsdale* (f), Lord Kenyon, C. J., refused to receive an agreement made by the bankrupt with his children, it not being stamped, though offered to shew the fraudulent purpose of the bankrupt in favour of his children. And

(a) 3 Bos. & Pull. 311.

(b) 1 M. & Rob. 104.

(c) Peake's N. P. C. 58.

(d) 1 Taunt. 95.

(e) Per Bayley, J., Lancaster Sum. Ass. 1821.

(f) Peake's N. P. C. 167.

Lord *Tenterden*, when he admitted unstamped instruments as part of a fraud or crime charged, did it with hesitation, and subject to the future consideration of the Court. *Nash v. Duncombe* (a), *Rex v. Fowle* (b). In *Vincent v. Cole* (c), which was an action for work and labour, it having been shewn that the work was commenced under a written agreement, Lord *Tenterden* refused to look at an unstamped contract, to see whether certain works, alleged to be extras, were included in it or not. But these papers were not offered for a collateral purpose, but as direct evidence, to prove a specific issue, and were therefore not admissible.—Secondly, the plea, if proved, does not shew an illegal agreement. The petition having been filed, there were two parties litigant before a Committee of the House of Commons; the petitioner was perfectly master of the suit, and might, if he pleased, retire from it at any time; and if he might retire, he might do so on any terms he pleased, or could obtain. In the present case, the object of the petition, as set forth in the prayer, “that the election might be declared null and void,” was fully attained, and the petitioners were not bound to proceed for the mere object of establishing the charge of bribery, or in order to obtain their costs by means of a decision of the committee; neither were they obliged to run the risk of having to pay the costs of the opposition by a decision against themselves, in consequence of going on after the real object of the petition was satisfied. The Court will not say that the petitioner is compelled to run such a risk, but will see that he is in the situation of an ordinary suitor, who is at liberty, in the course of the suit, to make what terms he pleases with the opposite party.

Exch. of Pleas,
1838.

COPPOCK

^{v.}
BOWER.

Lord ABINGER, C. B.—If I entertained any doubt upon the question raised in this case, I should deem it proper

(a) 1 M. & Rob. 104. (b) 4 Car. & P. 592. (c) M. & Malk. 257.

Exch. of Pleas,
1838.

COPPOCK
v.
BOWER.

that the matter should be put into a course of further inquiry; but I feel no doubt whatever on the subject, and therefore think that the rule should be refused. The principal question in the case is, whether the Stamp Acts were intended to apply where the instrument is used, not as evidence of an obligatory contract between the parties, but to shew that the transaction between them is of such a nature as to be void in law. And there are many authorities, that for such a purpose it may be received in evidence without a stamp. It is admitted by the learned counsel to have been decided, that a party who sets up an usurious contract, may prove it by means of an unstamped instrument; but he says that this is an exception, grounded upon the peculiar terms of the statutes against usury. I do not accede to that. The object of both the statute and common law would be defeated, if a contract, void in itself, could not be impeached, because the written evidence of it is unstamped, and therefore inadmissible. If that were so, a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is whether the agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility. As in the case of a conspiracy, or an agreement to commit a robbery, on no principle could it be contended that a contract between the parties for the commission of such an offence would be inadmissible without a stamp. I think that the Stamp Acts are made for a different purpose—they are made to prevent persons from availing themselves of the obligatory force of an agreement, unless that agreement is stamped. Then the next question is, whether this is an unlawful agreement; and I think, that though it may not be so by any statute, yet it is unlawful by the common law. Here was a petition presented on a charge

of bribery. Now this is a proceeding instituted not for the benefit of the individuals, but of the public—and the only interest in it which the law recognises, is that of the public. I agree, that if the person who prefers that petition finds, in the progress of the enquiry, that he has no chance of success, he is at liberty to abandon it at any time. But I do not agree that he may take money for so doing, as a means and with the effect of depriving the public of the benefit which would result from the investigation. It seems to me as unlawful to do so, as it would be to take money to stop a prosecution for a crime. In either case the prosecutor might say that he is not bound, at his own expense, to continue an enquiry in which the public alone are interested; but such a reason does not amount to an excuse, where he receives money for discontinuing the proceedings. Without saying whether it was unlawful to receive money as a consideration for constraining a future election, it is enough in the present case to determine, that a contract for money to abandon a petition for bribery was illegal, and being so, that the papers containing the evidence of it did not require to be stamped.

Exch. of Pleas,
1838.

COPPOCK
v.
BOWER.

PARKE, B.—I am of the same opinion, and desire to add but little to what has been stated by the Lord Chief Baron. In the first place, I think that these papers are not within the purview of the statute, which applies only to instruments used as evidence of a binding agreement, and not to instruments offered for a collateral purpose. The cases cited in argument shew that such papers, though unstamped, are receivable for the purpose of cutting down an agreement. Then the next question is, was this an unlawful agreement? I think that such an agreement is unlawful, because the penalty imposed on a member for bribery, is a penalty imposed for the benefit of the public, and the case is the same as that put by the Lord Chief

Exch. of Pleas, Baron, of money taken by an individual to stop a **pro-**
1838. secution.

COPPOCK
v.
BOWER.

ALDERSON, B.—I am of the same opinion. The statute enacts, that a stamp is necessary upon an agreement, “whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument.” Taking the whole together, it must be implied that a stamp is unnecessary, where the instrument shews no contract in law, and cannot be enforced between the parties. In the particular cases referred to, in which a stamp was required, it will be found that the agreement in each was valid as between the parties to it, though not obligatory in all respects and as to others. Now here, the written papers were not obligatory between the parties, and they were put in evidence to shew what is called a void agreement, but which, under the circumstances, is no agreement at all. I think the agreement was an illegal one.

GURNEY, B., concurred.

Rule refused.

BUZZARD v. BOUSFIELD.

Where an insolvent debtor was discharged, except as to two of the creditors named in his schedule, but it was ordered that as to those two debts, he should not be discharged until he had been in custody for 16 months; and one of these creditors (who had not previously commenced any action against him) immediately on his discharge lodged a detainer against him:—*Held*, that the case was within the 15th section of the Insolvent Act, 7 Geo. 4, c. 57, and therefore that the defendant was not supersedeable on the ground of the plaintiff's not proceeding to declare within two terms.

IN this case the defendant had been arrested, on the 5th of February last, at the suit of another plaintiff: on the 7th, he filed his petition in the Insolvent Debtors' Court for his discharge under the Insolvent Act, and on the 11th of May it was accordingly ordered by that Court that he should be discharged forthwith as to all the debts mentioned in his schedule except [two, one of which

Quære, whether the plaintiff was bound to proceed further in the action at all.

was that due to the present plaintiff; and that as to those two debts, he should not be discharged until he had been in custody at the suit of those creditors for the space of sixteen months from the date of filing his petition. At the time when this order was made, the plaintiff had not commenced any action against the defendant; but a few hours afterwards, he lodged a detainer against him. The plaintiff had not since proceeded to declare in the action.

Exch. of Pleas,
1888.

BUZZARD
v.
BOUSFIELD.

Kelly moved for a rule to shew cause why the defendant should not be discharged out of custody. It is clear that the defendant is supersedeable, more than a term having elapsed without a declaration being filed against him, unless the case be within the provisions of the 15th section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, on which the plaintiff relies. That section provides, "that no prisoner, who shall have petitioned the Court for relief under this act, shall, after the filing of his or her petition, be discharged out of custody as to any action, suit, or process, for or concerning any debt, sum of money, damages, or claim, with respect to which an adjudication in the matter of such petition can, under the provisions of this act, be made, by or by virtue of any supersedeas, judgment of non pros., or judgment as in the case of a nonsuit, for want of the plaintiff or plaintiffs in such action, suit, or process proceeding therein." It is submitted that this clause applies only to cases in which the action was commenced, or process issued, before the insolvent's discharge under the act. The 50th section has a material bearing on this point. It provides (inter alia) that the discharge of any prisoner so adjudicated as aforesaid, as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such prisoner before the filing of his schedule, in any action or suit brought by such creditor against such prisoner for

Exch. of Pleas,
1838.

BUZZARD
v.
BOUSFIELD.

the recovery of the same; and that all persons, as to whose demands for any such costs the prisoner shall be so adjudged to be discharged, shall be deemed and taken to be creditors of such prisoner in respect thereof, subject to ascertaining the amount by taxation and examination. The prisoner, therefore, is not discharged as to costs incurred subsequently to the filing of his schedule; so that a creditor suing him after he has filed his schedule, may inflict costs upon him. Even now, therefore, the defendant will not be discharged from the costs of this action: why is he then to be deprived of the power of trying whether he is liable to those costs? [*Parke, B.*—As to the costs accruing after the filing of the schedule, the law gives him a protection, because he may plead his discharge in bar as to them.] This is not an action for a debt with respect to which an adjudication could be made, according to the terms of s. 15, not having been commenced until after the adjudication. [*Parke, B.*—"Can be made" means "is authorised by this act to be made." *Alderson, B.*—An adjudication can be made with respect to this debt, for it has been made. When the schedule is filed, the parties are in such a situation as that the Court has a competent jurisdiction to direct the discharge prospectively. The case seems to me to be within the very words of the 15th section. A declaration would be a perfectly useless expense].

PARKE, B.—I think it is clear that as soon as the defendant's discharge is perfected, at the end of the sixteen months, he will have a good plea in bar to any action already brought, or to be brought, as to this debt; he must have a verdict on that plea, and therefore his costs. The only difference is, that as to the costs incurred before the filing of the schedule, the law gives an express discharge in respect of them, and a corresponding remedy to the plaintiff. The 15th section was made to exonerate

unfortunate plaintiffs who have insolvent debtors, from the necessity of incurring further expense in proceeding against them, and therefore provides that the rule of Court relating to the supersedeas shall not apply, whenever the defendant has filed his petition and schedule in the Insolvent Court. It applies to all actions, whether brought before that time, or brought afterwards to enable the creditor to imprison the party for the term specified in the adjudication: as to such actions, it repeals the rule as to supersedeas altogether, in order to relieve the plaintiff from further expense in a case where it is altogether unnecessary and useless. The defendant, therefore, is not entitled to be discharged. Perhaps the plaintiff may be bound to go on with his action as against other prisoners; but it is not necessary to decide that.

Exalt. of Pleas.
1838.

BUSSEARD
BONNETT.

ALDERSON, B.—I doubt whether the plaintiff is even bound to go on within a year, when the defendant is to be discharged after sixteen months: it is necessary to commence the action, for the purpose of authorizing the gaoler to detain the party; but it does not seem to be necessary to go on with it, because at the end of the sixteen months the plaintiff is to come in and take his rateable share with the other creditors, having elected to oppose the debtor, and punish him under the act. It is enough, however, for the present purpose, to say that he is clearly not supersedeable.

GURNEY, B., concurred.

Rule refused.

REYNOLDS v. POCOCK.

BARSTOW had obtained a rule to shew cause why the defendant, who had been taken on a *capias ad satisfaciendum*, should not be discharged out of custody, on the ground that he was privileged from arrest, as being an

A page of the presence in ordinary to the Queen is privileged from arrest.

Exch. of Pleas,
1838.

REYNOLDS
v.
POCOCK.

ordinary servant with fee of her Majesty, viz., a page in the presence of the second class in ordinary. The affidavit of the defendant stated, that he received a half-yearly salary; that, by an arrangement between him and other pages of the same class, they attended on her Majesty month about in rotation, and that his turn of attendance, according to that arrangement, would arrive on the 12th of November; but that, notwithstanding such arrangement, he was liable to be called on to attend at any moment.

Alexander shewed cause.—There are many cases in which the courts have refused to discharge, on motion, persons attached to the household of the Sovereign; as a gentleman of the King's privy chamber (*a*), the Son of the King (*b*), the deputy governor or wardens of the Tower (*c*). On the other hand, the privilege has been held to extend to the clerk of the King's kitchen (*d*), his coachman in ordinary (*e*), and other menial servants of the Sovereign (*f*). But although the privilege has been held to extend to menial servants of the Crown, it has not been held to extend to the case of this defendant, which class it is alleged that the case of this defendant falls, yet it has been said that such persons may be discharged after notice given to and consent obtained from Lord Chamberlain (*g*): and there is an affidavit in this case, stating that the Lord Chamberlain has been applied to, and has replied that he cannot interfere.

(*a*) *Luntley v. Battine*, 2 B. & Ald. 234.

(*b*) *Leslie v. Disney*, 1 C. M. & R. 578.

(*c*) *Batson v. M'Lean*, 2 Chit. R. 48; *Bidgood v. Davies*, 6 B. & C. 84.

(*d*) *Bartlett v. Hebbes*, 5 T. R. 686.

(*e*) *King v. Foster*, 2 Taun.

(*f*) See *Hatton v. Hopk* M. & Sel. 271; *Sard v. F* 2 D. & R. 250, 1 B. & Cr. *Byrn v. Dibdin*, 1 C. M. & R. *Aldridge v. Barry*, 3 Dowl. 450, n.

(*g*) 2 Keb. 3, 485; T. R. 485; 1 Tidd. Pr. 190.

PER CURIAM.—We think it is clear that the privilege *Exch. of Pleas,*
 extends to this defendant, who is bound to attend the *1838.*
 Queen as an ordinary servant with fee.

REYNOLDS
 v.
 POCKOCK.

HODSON v. PENNELL.

CHANDLESS had obtained a rule to shew cause why the judgment signed by the plaintiff should not be set aside for irregularity. The defendant had obtained time to plead, which expired on the 1st of November. On the morning of the 2nd, before the opening of the office, the defendant's attorney delivered a plea dated the 1st; the plaintiff treated it as a nullity, and signed judgment.

Where a plea is delivered bearing date on a former day, contrary to the rule of H. T. 4 Will. 4, it is an irregularity, but not a nullity.

Hunfrey shewed cause.—The question turns upon this, whether the delivery of a plea so dated was a nullity or only an irregularity. Now, the rule of H. T. 4 Will. 4, (General Rules and Regulations, s. 1,) which has the force of an act of Parliament, expressly requires that every pleading shall be entitled of the day when it was pleaded, and *shall bear no other* time or date. It would seem to follow, therefore, that if it does bear another date, it is altogether a nullity. It is difficult to determine the precise limits between irregularity and nullity; but it has been held that where a plea required to be signed by counsel is not so signed, it may be treated as a nullity (a); although that is required only by a rule of practice established by the authority of the Courts, and not under an act of Parliament. So, if a defendant, after craving oyer of a deed, do not set forth the whole deed, the plaintiff may sign judgment as for want of a plea: *Wallace v. Duchess of Cumberland* (b). So, where, in several penal actions

(a) *Samuels v. Dunne*, 3 Taunt. 386.

(b) 4 T. R. 370.

sch. of Pleas,
1838.

HEDSON
v.
PENNELL.

against different parties under the 27 Geo. 3, c. 1, s. 2, for printing illegal schedules of the lottery, the plaintiff had joined them all in one affidavit to hold to bail, instead of filing a separate affidavit against each, it was held that the irregularity was not waived by their putting in bail, and the Court stayed the proceedings against all of them on motion: *Goodwin v. Parry* (a). That was in effect a decision that such an affidavit, being in contravention of the statute, was altogether a nullity. *Newham v. Hanny* (b), where a similar objection to a declaration was considered as being waived by lapse of time, may be relied on for the defendant; there, however, the defendant himself treated it as an irregularity only, and sought to set it aside on that ground; and the Court therefore said that for such purpose he must apply promptly.

LORD ABINGER, C. B.—A nullity is a nullity from beginning to end, and cannot be waived. Suppose a man has put the 5th by mistake for the 6th, is he not to be at liberty to shew that? The rule must be absolute, but without costs, as this appears to be the first decision on the point.

PARKE, B.—There is no decision on the point, and the most convenient course certainly is to construe this as an irregularity only.

ALDERSON, B.—The act of Parliament says that all writs must bear date on the day when issued; but if they are tested on a different day, they are not held void, but it is only considered as an irregularity, for which they may be set aside. When the rule says that pleadings shall bear the date when they are delivered, and no other, it means that they shall not be entitled generally of the

(a) 4 T. R. 577.

(b) 5 D. P. C. 259.

term. This plea is right on the face of it; and the wrong doing is in the nature of a mistake. Where a plea bears no signature of counsel, it is wrong on the face of it; and the same observation applies to the other cases cited by Mr. *Hamfrey*.

Each. of Pleas,
1838.

HODSON
v.
PENNELL.

Rule absolute without costs.

JONES v. JOHN WILLIAMS.

THIS was an action of debt, under the 11 Geo. 2, c. 19, s. 4, to recover the double value of certain furniture and cattle alleged in the declaration to be the goods of William Williams, the father of the defendant, who was tenant to the plaintiff of a farm in the county of Merioneth, and to have been fraudulently removed from the premises by the assistance of the defendant. The only plea was not guilty. At the trial before *Vaughan, J.*, at the last Merionethshire assizes, the plaintiff having proved that William Williams was in arrear for rent to the amount of 170*l.*, and that the defendant and his brother had assisted in the removal of part of the furniture, and some of the live stock, of the value of about 80*l.*, from the farm to the house of the defendant's father-in-law,—the defendant tendered evidence to prove that under the will of a relative who had died while his brother and himself were infants, they were entitled to equal shares with their father of the furniture and stock on the farm, and that a valuation having been made of the whole, the goods and cattle removed had been assigned to them as their shares, and they had accordingly taken them away. The plaintiff's counsel contended that this defence was not admissible under the plea of not guilty, for that thereby the property of William Williams in the goods were admitted. For the defendant it was answered, that this was a penal action within the provisions of the stat. 21 Jac. 1, c. 4, s. 4, and therefore the plea of not guilty, notwith-

The 4th section of the statute 21 Jac. 1, c. 4, applies to penal actions given by subsequent statutes.

Therefore, in an action of debt on the 11 Geo. 2, c. 19, s. 4, for the double value of goods fraudulently removed from the premises of a tenant, the plea of nil debet (or, *semble*, not guilty) is still pleadable, notwithstanding the new rules, and puts all the facts in issue.

Exch. of Pleas,
1838.

JONES
v.
WILLIAMS.

standing the new rules, put all the facts in issue; for which *Earl Spencer v. Swannell* (a) was cited as an authority. The learned Judge received the evidence, and a verdict was found for the defendant, leave being reserved to the plaintiff to move to enter a verdict for the sum of 160*l.*, in case the Court should think it inadmissible. In the commencement of this term,

Jervis moved accordingly. — The question is, whether the plea of not guilty, in this action, is given by the stat. 21 Jac. 1, c. 4, s. 4. The statute 11 G. 2, c. 19, clearly does not give it. It must be admitted, since the case of *Earl Spencer v. Swannell*, that this is a penal action: but the question is whether the fourth section of the statute of James applies where the action is given by statutes subsequent. An opinion was certainly intimated by the Court, in *Earl Spencer v. Swannell*, that it does; but the point did not arise in that case. [*Parke, B.*—The point was much considered by the Court.] The fourth section is the same in terms, as to this matter, as the preceding; and they have been held not to apply to actions under subsequent statutes. [*Parke, B.*—The first section is limited to the proceedings in which there was the option there mentioned.] The words are large enough, in both, to comprehend all penal actions. The 11 G. 2, c. 19, s. 3, expressly gives the plea of the general issue to the tenant himself, but s. 4, gives none to the party assisting in the removal; whence it may be inferred that it was not intended he should avail himself of it. Besides, there is no express decision that *not guilty* was a good plea, even before the new rules; it was doubted in *Coppin v. Carter* (b), and in *Faulkner v. Chevell* (c). [*Lord Abinger, C. B.*—You are too late for that objection after verdict.]

Cur. adv. vult.

(a) 3 M. & W. 154.

(b) 1 T. R. 462.

(c) 5 Ad. & E. 213; 6 N. & M. 704.

On a subsequent day,

Exch. of Pleas,
1838.

JONES
v.
WILLIAMS.

LORD ABINGER, C. B., said,—The question in this case was, whether the plea of the general issue was a proper plea to a penal action to recover the double value of goods which had been removed to avoid a distress. We are of opinion that it was: that the new rules do not at all prevent parties from pleading the general issue to penal actions, and that the fourth section of the 21 Jac. 1, c. 4, is applicable also to subsequent statutes. There will therefore be no rule.

PARKE, B.—The case of *Earl Spencer v. Swannell* was mentioned as in effect deciding the point. We are satisfied that the clause of the act of 21 Jac. 1, c. 4, which has been alluded to, applies to the subsequent statutes. I agree, therefore, with my Lord, that there should be no rule in this case.

Rule refused.

DAVIES v. GRIFFITHS.

BUSBY moved for a rule calling on the under-sheriff of Merionethshire, under the stat. 1 Vict. c. 55, s. 3, to shew cause why he should not answer for a contempt, in taking larger fees than those allowed by the table of fees made in pursuance of that statute. Execution having issued against the defendant on a judgment for a sum under 100*l.*, his goods were seized under the *fi. fa.*, and sold by auction; and the under-sheriff charged not only his fees for the auction, but also for his poundage, under the 29 Eliz. c. 4.—*Busby* argued, that that statute was impliedly repealed by the 1 Vict. c. 55, s. 2, which enacts that “from and after the passing of this act, it shall be lawful for sheriffs, or their officers concerned in the execution of process directed to sheriffs, to demand, take,

The sheriff's right to poundage is not affected by the stat. 1 Vict. c. 55, or the table of fees made under it.

Exch. of Pleas,
1838.

DAVIES
v.
GRIFFITHS.

and receive such fees, *and no more*, as shall from time to time be allowed by any officer of the several Courts of Law at Westminster, charged with the duty of taxing costs in such courts, and under the sanction and authority of the judges." The table of fees drawn up in pursuance of that statute expressly specifies the fees to which the sheriff is to be entitled on a sale by auction. [Lord Abinger, C. B.—I believe it was never meant by this Act of Parliament to meddle with poundage at all. Parke B.—Your argument must go to this extent, that if the sheriff, at the request of the party, does not sell by auction, he can have no fees; nor if he takes the body.]

Lord ABINGER, C. B.—This act of Parliament relates only to fees provided for by the acts mentioned in it and expressly repealed, or by custom: it does not affect the rights of sheriffs under acts of Parliament not mentioned in it.

PARKE, B., and GURNEY B., concurred.

Rule refused.

CAMDEN v. FLETCHER, Executor of MARY BURCOMBE,
Deceased.

Where a party receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor de son tort, unless he receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased: which is a question for the jury.

ASSUMPSIT for work and labour, journeys and attendances, done and given, and materials provided, by the plaintiff for the intestate in her lifetime, and on an account stated between them. Pleas—first, non assumpsit; secondly, ne unques executor; thirdly, plene administravit; on which issues were joined. At the trial, before the

eriff of Middlesex, it appeared that the action was by the plaintiff, who was an apothecary, against defendant as executor de son tort of Mary Burcombe, for the sum of 8*l.* 12*s.*, the amount of the plaintiff's medicines supplied to and attendance upon the

Each. of Pleas,
1838.

CAMDEN
v.
FLETCHER.

It was proved that the deceased, who was the -law of the defendant, had been entitled to an of 15*l.* a-year, payable out of lands occupied by a . For some time before her death, she had n the defendant's house. After her death, the : applied to Slack for, and received from him, f 7*l.* 10*s.*, being the amount of a half-year's pay- ch had become due, of the annuity, for the pur- ying the expenses of her funeral; and it appeared plied 5*l.* 15*s.* of the money to that purpose. The of 1*l.* 15*s.* remained in his hands, but he had the plaintiff his willingness to pay it over to the litors of the deceased; claiming, however, to be o payment to a greater amount for her board and and for the hiring of a nurse to attend her. ntended for the defendant, that this was not evidence to charge him as executor de son the under-sheriff was called upon to nonsuit iff. He however declined to do so, but stated ould withhold the writ of trial, in order to give ant an opportunity of taking the opinion of the nd he left it to the jury to say whether the de- as proved to be executor de son tort. The ag found a verdict for the plaintiff, damages

tained a rule nisi for a nonsuit or new trial, on d that the evidence was not sufficient to charge ant in the character of executor de son tort, or l events, the under-sheriff ought himself to have

Erech. of Pleas,
1838.

CAMDEN
v.
FLETCHER.

decided that point, and not to have left it to the jury as a question of fact.

Martin shewed cause.—There was abundant evidence to go to the jury that the defendant was executor de son tort. It is laid down in all the authorities that the receipt of debts of the deceased, for the purpose of administration, is sufficient to make the party chargeable as executor of his own wrong; *Read's case* (a); Com. Dig. Administrator, (C.) And it is as clearly established, that an executor de son tort cannot, as against other creditors, retain for his own debt; *Coulter's case* (b); *Curtis v. Vernon* (c).

Lee, contra.—The authorities referred to do not apply to this case. It is clear that the mere act of directing the funeral of the deceased will not make the party executor de son tort. In Williams on Executors, Vol. 1, p. 151, it is said, "There are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects," &c., "for these are offices merely of kindness and charity." And again, (p. 152), "So, if a man lodge in my house, and die there, leaving goods therein behind him, I may keep them until I can be lawfully discharged of them, without making myself chargeable as executor in my own wrong." This was one solitary receipt of a single sum of money, for the express purpose of providing for the funeral; and the defendant offered to pay over the surplus. In *Serle v. Waterworth* (d), stronger acts of interference than this were held not to be sufficient to charge

(a) 5 Co. 34.

(b) Id. 30.

(c) 3 T. R. 587; S. C. in error,

2 H. Bl. 18.

(d) Ante, p. 9.

the defendant as executrix de son tort. [*Parke, B.*—The only question seems to be, whether the defendant's receipt of a sum which turned out to be more than was necessary for the expenses of the funeral, would not make him executor de son tort, he having a right to receive and retain for the reasonable expenses of the funeral only. That would be a question for the jury, whether he received more than the reasonable expenses.] No such question was left to the jury, but only the question of law, which ought to have been determined by the Court, whether the facts were sufficient to make him executor de son tort. The defendant could not tell beforehand the precise expense of the funeral.

Exch. of Pleas,
1838.

CAMDEN
v.
FLETCHER.

LORD ABINGER, C. B.—It appears to me, that the under-sheriff ought to have left it to the jury to say whether the sum of 7*l.* 10*s.* was a greater sum than the defendant ought to receive for the purpose of providing for the funeral. I should certainly have thought that it was not. The under-sheriff has in effect reserved it for the Court to say whether the 7*l.* 10*s.* was assets in the hands of the defendant; but we cannot decide that; he should have left it to the jury. The rule must therefore be absolute for a new trial.

PARKE, B.—There is no doubt that the undertaking to order the funeral of a deceased person, and appropriating a reasonable sum to that purpose, does not make the party an executor de son tort. The defendant had, therefore, a right to receive a reasonable amount for this purpose, the expenses being calculated on what must be assumed to be an insolvent estate: if he receives more, he in effect pays out of the assets. Whether he did so or not, should have been left to the jury.

GURNEY, B., concurred.

Rule absolute for a new trial.

Exch. of Pleas,
1838.

ISAAC, Assignee of the Sheriff of Middlesex, v. RICKARDO and Another.

Where a defendant, on being arrested, gave bail to the sheriff, and subsequently obtained an order to stay proceedings in the action, on payment of debt and costs forthwith, "the plaintiff to be at liberty to sign final judgment, and issue execution for the amount," if the debt and costs were not so paid; and default being made in payment, the plaintiff took an assignment of the bail-bond, and issued process against the bail, after which the defendant died:—*Held*, that the bail were entitled to stay proceedings on the bail-bond on payment of costs; that the order did not require them to put the plaintiff into a condition to sign judgment, by justifying bail above, and therefore he had not lost a judgment by their laches.

IN this case the defendant in the original action was arrested on the 6th of July, and gave bail to the sheriff. On the 14th, an order was made to stay proceedings upon payment of the debt and costs forthwith, "the plaintiff to be at liberty to sign final judgment, and issue execution for the amount," if the debt and costs were not so paid. The costs were taxed on the 17th of July; and on the 14th of August, an assignment of the bail-bond was taken, and a writ issued, the debt and costs not having been paid. On the 9th of September, the original defendant died. Under these circumstances, *Archbold* obtained a rule to stay proceedings on the bail-bond on payment of costs.

Jervis shewed cause.—The plaintiff not having declared de bene esse, no trial has been lost; but if by the laches of the bail the plaintiff has lost a judgment, the effect will be the same, and the Court will not interfere. This will depend upon the construction of that part of the order which authorizes the plaintiff to sign final judgment. Surely it cannot mean that the bail are to be discharged and the plaintiff is to take the security of the original defendant only. If so, as the order in question is a mere matter of course, bail might always be discharged without any corresponding advantage to the plaintiff, for the defendant might never intend to pay the debt and costs. The meaning is, that if the money be not paid, and bail be put in, the plaintiff shall not be put to the expense of a trial to ascertain the amount, but may sign judgment immediately. To do this, the bail to the sheriff must justify bail above in order to put the plaintiff into a condition to sign judgment; and not having done so, they have been guilty of laches, and the Court will not interfere.

Archbold, contra.—The authority to sign judgment is for the benefit of the plaintiff, and the defendant obtains no advantage, not even delay, from that part of it on which the question turns. There is no authority upon the subject; but the uniform practice has been to treat this part of the order as a benefit to the plaintiff, and an authority for him to enter a common appearance, or to sign judgment without an appearance, the effect of the order being a consent binding the parties, that in default of payment the judgment may be signed immediately.

Exch. of Pleas,

1838.

ISAAC

v.

RICKARDO.

PARKE, B.—This question appears to turn on the meaning of the condition introduced into the order. If no order had been made, the plaintiff would not have been entitled to have the bail-bond stand as a security, because he had not declared in the original action; but if by the laches of the bail he has lost a judgment, the Court will not interfere to relieve the bail. The order, upon the face of it, merely imports that the plaintiff is to be at liberty to secure himself by signing final judgment; but it is said that it means more, and that the bail are bound to put the plaintiff into a condition to do so by justifying bail. In my opinion, it means only what the words import, and if the plaintiff wishes to avail himself of the security of the bail, he should take care to insert in the order a clause compelling the bail to the sheriff to put in special bail, so as to enable the plaintiff to sign final judgment, and at the same time keep the security of the bail. If this be not done, I think the rule authorizes the plaintiff to sign final judgment upon entering a common appearance, which the plaintiff might have done in this case, and therefore has not lost a judgment.

LORD ABINGER, C. B.—I agree with my Brother *Parke* in the construction which he has put upon the rule. The plaintiff is to be at liberty to sign judgment without special bail.

Rule absolute.

Exch. of Pleas,
1838.

RICHARDSON v. DALY and RIGGLESFORD.

Where a defendant, more than four months after the issuing of a writ of capias against him, gave the plaintiff's attorney a cognovit to enter up judgment:—*Held*, that the attorney was thereby empowered (without any express authority for that purpose, and notwithstanding the lapse of time), to enter an appearance for the defendant, and to take all other proceedings necessary to obtaining judgment.

C. JONES had obtained a rule calling on the plaintiff to shew cause why the judgment signed in this case against the defendant Rigglesford, should not be set aside for irregularity. It appeared from the affidavits, that a capias ad respondendum having issued against Rigglesford, he gave the plaintiff's attorney, seven months afterwards, a cognovit, by force of which the attorney entered an appearance for him, and afterwards signed judgment for want of a plea. It was objected for the defendant, first, that as the cognovit did not expressly authorize the plaintiff's attorney to enter an appearance, he had no right to do so; and secondly, that the cognovit not having been given, nor the appearance entered, until more than four months after the issuing of the writ, they were altogether inoperative, there being then no valid writ in existence upon which to found them.

PARKE, B.—This rule must be discharged with costs. I have consulted the Master, who certifies the practice to be, (as the plain sense of the matter is), that a cognovit is supposed to be given by a defendant who is in Court, and to authorize the plaintiff's attorney to do every thing necessary for proceeding with the action in order to obtain judgment, and consequently to enter an appearance if necessary. Then, with respect to the other objection, if a defendant chooses voluntarily to come into Court and give a cognovit after the writ has ceased, from lapse of time, to be in force against him, surely it is competent to him to do so, since the only object of the writ is to bring him into court.

The other Barons concurred.

Rule discharged, with costs—

Platt appeared to shew cause against the rule.

Each. of Pleas,
1838.

WAINWRIGHT and Another, Assignees of EDWARD SHAKELL, an Insolvent, *v.* CLEMENT and Another.

ASSUMPSIT for money had and received to the use of the plaintiffs as assignees, and on an account stated between them. Pleas, 1st, non assumpserunt; 2ndly, as to the sum of 378*l.* 3*s.* 6*d.*, parcel of the monies in the first count mentioned, payment of that sum to the provisional assignee of the Insolvent Debtors' Court; 3rdly, as to the sum of 84*l.* 19*s.* 11*d.*, further parcel of the monies in the first count mentioned, actionem non, because the defendants say that that sum was a sum of money belonging to the said Edward Shakell, and being and remaining in the hands of the defendants at the time when he subscribed his petition and executed the assignment of his estate and effects as such insolvent debtor as aforesaid, and now remaining in the hands of the defendants; and that the said Edward Shakell, before and at the time when he so subscribed his petition and executed such assignment as aforesaid, was indebted to the defendants in a large sum of money, to wit, 100*l.*, for work and labour then done, and materials for the same provided by the defendants as the attorneys, solicitors, and agents of and for the said Edward Shakell, and on his retainer, and for journeys and other attendances made and given by the defendants for the said Edward Shakell, at his request, &c. &c. [proceeding in the ordinary form of a plea of set-off.]

Fourth plea, as to the same sum of 84*l.* 19*s.* 11*d.*, that, long before and at the time of the defendants' receiving the said sum of money, they had been and were the attorneys and solicitors of and for the said Edward Shakell, and that the said Edward Shakell, before and at the several times

Where a person in insolvent circumstances, being pressed by particular creditors, employed an attorney to endeavour to effect an arrangement with all his creditors, but that failing, the attorney advised that his goods should be sold by auction, and that he should go through the Insolvent Debtors' Court, in order that his effects might be rateably divided amongst his creditors; and the goods were sold accordingly, and the proceeds were, with the insolvent's assent, paid over by the auctioneer to the attorney, who (after making several payments to and on account of the insolvent) retained against the assignees the whole amount of his bill for the business done for the insolvent:—*Held*, that this was not a voluntary

transfer or delivery of that sum by the insolvent to the attorney, within the 7 G. 4, c. 57, s. 32, there being no proof that it was intended that he should hold the proceeds for his own benefit, or for the benefit of any particular creditors, or otherwise than as the agent of the insolvent.

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

when they the defendants received the said sum of money, and when he the said Edward Shakell subscribed his petition and executed the assignment of his estate and effects as aforesaid, was indebted to the defendants as his attorneys and solicitors aforesaid, in a large sum of money, to wit, 100*l.*, for and on account of work and labour done, &c. &c. [as in the third plea]; and the defendants further say, that the said sum of money, parcel &c., was and is a sum of money received by the defendants, as such attorneys and solicitors of and for the said Edward Shakell, before he subscribed his petition &c., in the way of the profession and business of the defendants as such attorneys and solicitors, and not otherwise; and that the said last-mentioned sum of money remained, and was and still is, in the hands of the defendants, as such attorneys and solicitors of and for the said Edward Shakell as aforesaid; wherefore the defendants, as such attorneys and solicitors, still detain the same as a lien and security for the said sum of money so due and owing to them from the said Edward Shakell as aforesaid, which still remains due and in arrear to the defendants. Verification.

The plaintiff, as to the 378*l.* 3*s.* 6*d.* mentioned in the second plea, entered a nolle prosequi; and to the third and fourth pleas, replied that the 84*l.* 19*s.* 11*d.* came to the hands of the defendants by means of a voluntary transfer and delivery thereof by the said Edward Shakell theretofore, and, within three months next before the commencement of his imprisonment, he the said Edward Shakell being then in insolvent circumstances, made to the defendants, they the defendants then being creditors of the said Edward Shakell, and with the view and intention by the said Edward Shakell of petitioning the Court for the relief of Insolvent Debtors in England for his discharge from custody, according to the statute; whereby and by reason of the aforesaid premises, and of the statute in that case made and provided, the said transfer and delivery

became void as against the plaintiffs as assignees. Verifi- *Esch. of Pleas,*
cation. 1838.

The rejoinder denied the allegation of the replication in its terms : and thereupon issue was joined. *WAINWRIGHT*
v.
CLEMENT.

At the trial before *Gurney, B.*, at the Middlesex sittings after last term, the plaintiffs, in order to prove their case, put in the general bill of costs delivered by the defendants, Messrs. Clement and Newman, who were attorneys at Southampton, to Shakell, who had carried on business as an upholsterer there ; and which was the subject of their set-off. It commenced on the 14th of March, 1837, and the first two items were as follows :—

“Attending you, when you informed us that you had been much pressed by your creditors ; that you had been arrested on the preceding day, and had two other actions at the suit of Messrs. Nutt & Co. and Messrs. Stedman & Co., pending against you, and that you had five actions brought against you during the last month, and expected that other writs would follow, and that Messrs. Wainwright had threatened to arrest you immediately : conferring and advising with you, when it was determined that you should immediately endeavour to effect an arrangement with your creditors, and if you failed in doing so, take measures to give up your property for the equal benefit of all your creditors ; and it was arranged that you should bring us a list of all your creditors, and statement of your effects, in the evening.

“Attendance on you again in the evening, when you shewed us a list of your creditors, and statement of your assets ; perusing same, when it appeared that your debts amounted to 1,764*l.* 19*s.* 11*d.*, and your effects, if you were suffered by your creditors to make the most of them, to about 700*l.*, but, if not, that they would probably realise about 500*l.* : conferring with you thereon, when we pointed out various particulars upon which the statement required explanation and amendment, which it was arranged you

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

should make: conferring and advising with you, when it was agreed that you should offer to your creditors 6s. in the pound, to be secured to them by bills at three, six, and nine months after date, by two respectable parties, upon your creditors executing a release to you of the surplus; and it was arranged that as Messrs. Wainwright were most pressing, we should write to our agents to see them, and make the proposition to them, and prevent their taking proceedings against you."

It appeared from subsequent items of the bill, that Shakell being unable to carry the composition into effect, for want of obtaining sureties satisfactory to the creditors, the defendants advised the sale of his goods by auction, in order that he might go through the Insolvent Debtors' Court, and the proceeds might thus be rateably divided among the creditors. They were sold accordingly, on the 12th and 13th of April; and on the 15th appeared the following item in the bill:—

"Attending on you and Mr. Perkins, (the auctioneer), examining and arranging the accounts of the sale with him, when he paid over the balance of his account to us, &c."

The auctioneer was also called as a witness, and stated that he was employed by the insolvent to sell his effects; that before the sale he received orders from the defendant to pay over the proceeds to them; and that he accordingly paid over to them the sum of 548*l.* 3*s.* 6*d.*, the net proceeds of the sale, after payment of expenses, rent, &c. On the 25th of April, Shakell, under the defendants' advice, rendered to prison in discharge of his bail, under the arrest of the 14th of March, and subsequently filed his petition to the Insolvent Debtors' Court, and in the month of June was discharged, the plaintiffs having been appointed his assignees. The defendants continued to act as his legal advisers down to the period of his discharge, and their whole bill of costs amounted to 46*l.* 13*s.*

mediately on the money being paid by the auctioneer to the defendants, they handed over to the insolvent, out of it, the sum of 60*l.*, to enable him to pay his expenses in London and in prison; they afterwards paid the landlord of his house at Southampton a further half-year's rent of 30*l.*; and after his discharge, they paid over to the plaintiffs the further sum of 378*l.* 3*s.* 6*d.*, retaining the residue, 80*l.*, to satisfy the above bill of costs, and also some other costs in the actions at law brought by the plaintiffs and other creditors against the insolvent, which had proceeded up to the time of his surrender to prison.

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

On this evidence, it was contended for the defendants that there was no proof of any voluntary transfer by the insolvent to the defendants, within the meaning of the Insolvent Debtors' Act:—that there was no transfer or delivery in fact of the money by him to them; and if there was, that it was not a transfer made for their benefit as particular creditors, but in order to carry into effect an arrangement for the general benefit of the creditors of the insolvent. The learned judge reserved the question for the opinion of the Court, and under his direction a verdict was found for the plaintiffs, damages 80*l.*, the defendant having leave to move to enter a nonsuit.

In this term, *Erle* obtained a rule nisi accordingly, against which—

Sir *F. Pollock* and *Hoggins* now shewed cause.—This transaction fell within the prohibition of the 32nd section of the Insolvent Act, 7 Geo. 4, c. 57. The words of that clause are very large, and sufficient to overreach many transactions which are neither morally fraudulent, nor would have been legally fraudulent under the old bankrupt law. If the payment or transfer be voluntary,—without reference to what is passing in the mind of the party,—and if he be at the time insolvent, then the act declares that it shall be deemed fraudulent, and that the division

Erech. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

of his estate shall be made as from a period of three months before the commencement of his imprisonment. The facts of this case clearly bring it within the prohibition of the act. Where the client is known to be insolvent, it is an attorney's duty, if he is necessarily employed on his behalf, to insist on doing the business from day to day, without credit. No doubt, an insolvent has a right to pay his legal adviser for the necessary business done in the settlement of his affairs; but not by handing over to him the proceeds of his goods to the prejudice of all his other creditors. Here the defendants, with respect at least to their bills in the several actions, stood in the same relation to the insolvent as any other creditor. [*Parke, B.*—What was the making over or transfer by the insolvent to the defendants in this case?] The transfer to them of the proceeds of the sale by the auctioneer, with the insolvent's authority, was equivalent to a direct delivery to them by him. A payment by the insolvent to a creditor is within this section of the statute; *Herbert v. Wilcox* (a); and here he causes payment to be made to the creditor. And though he might not intend that the defendants should retain it for their own debt, if the transfer has that effect, it is within the clause. Suppose the proceeds had been deposited in the hands of the auctioneer, could he have retained them as for the defendants' lien? The defendants might have required a previous deposit of money or goods; that would have been under a contract made for good consideration, and not voluntary; but here no contract is shewn under which the transfer was made, nor any compulsion whereby the order was extracted from the insolvent. The attorney's claim of lien cannot defeat the express words of the act. Down to the 12th of April, the insolvent retained the complete control over the goods; they were then sold for the purpose of an equitable division

(a) 6 Bing. 203; 3 M. & P. 515.

the proceeds among his creditors; and the defendants, by the insolvent's consent, retained out of the proceeds the full amount of their debt. That was a voluntary making over of the amount, within the meaning of the statute.

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

Erle and Manning, contra.—This transaction was in no respect within the statute. First, it was not a *voluntary* transfer. The object of the insolvent throughout was to make a rateable division of his property among his creditors, and, if it were possible, to escape passing through the Insolvent Debtors' Court. The going to prison and applying to that Court was always contemplated by him as an ultimate alternative, and the defendants' services were employed to shield him from it. He was acting throughout under the compulsion of Wainwright's action, which would have swept away the whole property. The money was deposited in the defendants' hands in the course of a lawful purpose, to fulfil the law and make a rateable division among the creditors; not with the intent that they should pay themselves. The test of voluntariness is, whether the insolvent, knowing himself to be so, does an act whereto he is impelled by a desire to favour a particular creditor. It is not enough that it is the act of a *free agent*; but it must originate in his own mind, from his desire to benefit the particular transferee: *Arnell v. Bean* (a), *Mogg v. Baker* (b), *Simms v. Simpson* (c). There must be a motive contravening the intent of the statute, which requires a rateable division of the property. Here it is clear the insolvent never intended that the defendants should possess themselves of the money for their own benefit, but merely that they should receive it, in order to carry out a lawful arrangement for the benefit of the creditors at large.

(a) 8 Bing. 87; 1 M. & Scott,
151.

(c) 1 Bing. N. C. 306; 1 Scott,
177.

(b) 3 M. & W. 198; ante, p. 248.

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

But, secondly, there was no transfer or delivery by the insolvent *to a creditor*, within the meaning of the statute. The act contemplates the case of an insolvent going to a creditor *in his capacity of creditor*, with a view to the discharge of the debt existing between them. This money was not made over to the defendants *because* they were *creditors* of the insolvent, but in their capacity of *attorneys*, for the purpose of a division among the creditors; it being an essential step to the execution of that purpose that somebody should superintend the disposal of the property on the spot. They are employed as such, to effectuate a proper and lawful purpose, and the money comes to their hands in the course of effectuating it, and subject to the insolvent's order as to the distribution of it; it was their election to set off a portion of the money against their debt, which constituted the transfer or delivery to them. It resembles the case of a broker authorized to sell goods, and retaining the proceeds to satisfy his advances. [*Parke, B.*—You say that, to make an order to receive a transfer or delivery within the act, it must be such as shews that the insolvent meant that the party receiving should acquire the property in some goods or money.] Yes: all that is forbidden is a transfer of the property, either to the creditor himself, or circuitously and colourably for his benefit. In *White v. Bartlett* (a), where an insolvent employed the defendant, an auctioneer, to sell his property, and having sold it, he paid over the proceeds to the insolvent's order, after deducting the usual amount for the expenses of the sale, &c.; it was held that the auctioneer (although knowing at the time of the insolvency) was not liable to the assignees; yet he was just as much retaining for a bygone debt as the present defendants are. [*Parke, B.*—There the delivery of the goods to the auctioneer was on consideration that he should sell them, and he was not then a creditor.]

(a) 9 Bing. 378; 2 M. & Scott, 515.

But lastly, it is at least questionable whether the defendants were creditors at all, within the meaning of the statute. They were at the time conducting the suits at law for the insolvent, and had no right to abandon them while in progress, at least without notice; and there was therefore no debt due to them until the suits were at an end: *Harris v. Osbourn* (a). And even with regard to their general bill of costs, they were retained to wind up the insolvent's affairs, and could not stop short until that was effected.

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be made absolute. The question, on these pleadings, is confined entirely to the amount obtained in part satisfaction of the defendants' bill. It is the general action for money had and received, and the issue taken is, that the money was received by means of a voluntary transfer and delivery to the defendants. The whole question we have to consider therefore is, whether the case falls within the 32nd section of the Insolvent Debtors' Act. I have always considered that the words "*voluntary transfer*" or "*assignment*," in this clause, were to be taken in the same sense, as far as it could apply, as the word *voluntary* bore in the Bankrupt Act; it could not be to all intents the same, because the Insolvent Act does not require that the party should contemplate taking the benefit of the act, whereas the intention of the party to become a bankrupt is necessary under the bankrupt acts; but in all other respects the meaning of the phrase is the same. I think that voluntariness implies the spontaneous act of the party making the transfer or assignment, for the purpose of satisfying the debt of the particular creditor. Now let us look at the facts of this case, and see upon what it is that the plaintiffs can rely, in order to shew that this was a voluntary assignment. The transfer of the

(a) 2 C. & M. 629.

CASES IN THE EXCHEQUER,

goods to the auctioneer was in order that he might sell them for the benefit of all the creditors. And I find, by one of the statements in the bill given in evidence on the part of the plaintiffs, that at the particular period of the transaction, after attempts had been made to procure securities, so as to enable the insolvent to offer his creditors security, and to allow him to continue without any further proceedings, that certain resolutions for the disposal of the goods were adopted at a meeting of the creditors; it was not therefore a spontaneous act of his own, but a resolution of the creditors, that he should do this. I cannot imagine how this can be deemed a voluntary transfer or preference, unless you say every act a man does as a free agent is voluntary; but it is not voluntary within the meaning of the statute—it does not originate with himself, to favour a particular class of creditors, or a particular creditor; does it at the instance of the whole class, all of whom are ready to press on him by actions, and he has an immediate interest to come into their terms: and there cannot consider the transfer of the goods in this case a voluntary act. Then, in the next place, where is the evidence that there was a voluntary payment (now goods are turned into money) to the defendant; evidence to be gathered from the bill is, that it is solved that a sale should be made by auction, and the proceeds should be deposited, after retaining them sufficient for maintaining the insolvent and his family, and carrying him through the Insolvent Court, in the hands of the defendants, for the benefit of the creditors. That is not a proposal to pay the defendants; it imports no more than this, that in doing that act, to take to himself a part as would support his family, and pay the rest was to be, not paid to, but for the benefit of the defendants, as his agents. There is no proof here—that the insolvent

the defendants to keep any portion for themselves; but on the contrary, the evidence, as far as I can collect it from this bill, is rather that they had it on the understanding that they were to account to the creditors for it. Suppose even that the insolvent had brought the money, and said, "I will pay you 60%, and you will be so good as to keep the rest for the assignees;" and they had said, "We shall do no such thing, we mean to keep the 80% for our bill:"—that would merely be a sort of threat that they would so apply it, against the will of the insolvent. How can that satisfy the meaning of a voluntary payment? There is no sense which I can fix on the word voluntary, that I can make consistent with the evidence: for any thing that appears to the contrary, the defendants retain a portion of the money to satisfy their own demand, against the will of the insolvent. The onus probandi is thrown upon the plaintiffs; *they* must prove that the transfer was voluntary; they must give some evidence, shewing that something was done from which the jury might infer that it was a voluntary and spontaneous act on the part of the insolvent, to pay a particular creditor by means of this transfer. Now it does not appear to me, from the beginning to the end of the case, that there is any ground for any such inference. It may have been a result incidental to the particular mode of conducting the business, which the insolvent never contemplated, and to which he would never have assented.

Arch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

PARKE, B.—I also think that the rule ought to be made absolute, though I certainly have felt some doubt in the course of the discussion, and I am not altogether without doubt at the present moment; but it seems to me, on the whole, that the plaintiffs have not made out that this is a case of voluntary transfer or delivery, within the meaning of the act of Parliament, of the sum of money received by the defendants from the auctioneer.

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

The action is brought for money had and received the use of the insolvent's assignees; to which the defendants plead the general issue; and under that plea rather apprehend the whole of this question might have been gone into. They have also pleaded specially, *that* the money said to have been received to the use of the assignees was originally received for the use of the insolvent, and they plead a set-off against that sum of money, as to the sum of 84*l.*, for their bill for business done for the insolvent. The plaintiff replies, that the money so received was received in consequence of a voluntary transfer and delivery by the insolvent to the defendants, being creditors, within three months before the time when he took the benefit of the Insolvent Act, and also with the intent on his part of taking the benefit of the Insolvent Act; and that is the issue we are to dispose of. The defendants have a right to treat that as the only issue in the cause, so far as relates to the sum of 84*l.*; as to that sum the question is raised in form on the pleadings, and on that point the plaintiffs are tied up by the form of the issue. That brings us, therefore, to the question, whether the sum of money received under the circumstances which appear on the facts of this case, was a sum which could be said to be received by a voluntary transfer or delivery by the insolvent to the defendants, being creditors. [His lordship stated the facts of the case, and then proceeded.] The act insisted upon as being the voluntary transfer or delivery of the money paid by the auctioneer, is an order given by the insolvent to the auctioneer to account to the defendants for the surplus, in pursuance of which they received it from the auctioneer: and the question is, whether that is or is not a voluntary transfer or delivery within the meaning of the act of Parliament. Now it is contended on the part of defendants, that it is not within the meaning of the act, on several grounds; that, in the first place, the defendants

were not in the situation of creditors at all, as they had not completed any action in which they were engaged for him; but I think it clear, that in respect to advice unconnected with the bills of costs in the actions, they might have sued him at the time the order was given; and therefore it appears to me to be clear that they stood in the situation of creditors: this point, therefore, appears not to be made out on the part of the defendants. Then it is said the act is not spontaneous. I own I do not feel quite disposed to go along with the observations made by my Lord Chief Baron on that part of the case; for it is not what took place at the meeting of creditors, but the order given to the auctioneer to pay over the sum in dispute to the defendants, which it is said operates as a transfer; and that appears to have been the spontaneous act of the insolvent himself, or at least an act which he did in consequence of advice given by the defendants as his legal advisers. I think, certainly, that act may be considered a spontaneous act on the part of the insolvent; but I am not prepared to say the plaintiffs have made out what is the gist of the case, as to this being a voluntary transfer on the part of the insolvent. The construction which the cases have given to the term "voluntary," is, that the act must be not only spontaneous, and originating with the bankrupt or insolvent himself, but it must also be the act of transferring *for the benefit of a particular creditor or creditors*; and what it appears to me is not made out by the plaintiffs, is, that this order to receive the money was a transfer or delivery of the money to the defendants *as creditors*. On looking at the clause, I think it only means to render void the act of delivery which is to give a benefit to the creditor, that is, by which he is intended to acquire some property, either general or special, in the goods or money transferred, by way of security or satisfaction for his debt; but that is not the case here, for the order is not given to the auctioneer to pay the defendants, *as the creditors of the insolvent*, but in the character of agents;

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

Exch. of Pleas,
1838.

WAINWRIGHT
v.
CLEMENT.

and there was no contemplation to give them any property in or claim on the fund. It seems to me to be analogous to the case put by myself in the course of the argument, of an agent abroad receiving a debt due to his principal; it is paid to the agent, not for his own benefit, but for the principal in England, although, in consequence of the subsequent insolvency of the principal, he is entitled to set off his own debt. So here, the money was to be held by the defendants in their character of agents. If it had appeared that the defendants had, with the concurrence of the insolvent, received the money in question to hold it in deposit for themselves and other creditors, then I think it would have fallen precisely within this clause of the act of Parliament. It appears to me that that fact is not made out; for though it is clear it was all the insolvent had, yet the defendants were not to hold it as trustees accountable to the different creditors, and communicating to them that they were so, nor to hold any part of it for themselves; but it was received by them from the auctioneer, and remained in their hands, as agents, and the insolvent might have countermanded the application of the money to the creditors or any body else. On the whole, therefore, this does not appear to me to be a transfer or delivery to or for the benefit of any particular creditor. On this ground, though I must own I felt some doubt in the course of the enquiry, it seems to me that this case is not within the statute, and the rule must therefore be made absolute for a nonsuit.

GURNEY, B.—I entirely concur in the opinion of my Lord Chief Baron. It is alleged in the replication that this was a voluntary transfer; that issue is on the plaintiffs, and they are to make out that there was a voluntary transfer or delivery to the defendants within the statute. I think they have not made that out, but that the evidence is rather the other way.

Rule absolute.

Exch. of Pleas,
1838.

CHANTER v. HOPKINS.

MP SIT. The declaration stated, that the defendant was indebted to the plaintiff in the sum of 15*l.* 15*s.*, for licence, consent, and permission of the plaintiff then granted by him to the defendant at his request, to erect, set up, and use, at and upon certain premises of the defendant, a certain patent invention, whereof the plaintiff was then the owner and proprietor, called Chanter's Smoke-consuming Furnace, and to use and apply the same for the use and benefit of the defendant; and that the defendant had erected, used, set up, and applied to his own use and benefit the said patent invention of the plaintiff under and by virtue of the said license and permission.

There were also counts for goods sold, and for wages and labour. Plea, non assumpsit.

The trial before *Gurney*, B., at the London sittings at Easter Term, it appeared that the plaintiff was proprietor of a patent for the invention of a furnace for consuming its own smoke. The defendant, a brewer at St. Ives, Huntingdonshire, applied to him for one of his patent furnaces, by the following written order :

“ St. Ives, 16th Sept. 1835.

Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right, 15*l.* 15*s.*; iron work not to exceed 5*l.* 5*s.*; engineer's time fixing, 7*s.* 6*d.* per day.

“ Richard Hopkins, Vine Inn.”

The furnace and apparatus were accordingly sent in the month following, and put up upon the defendant's premises under the superintendence of a workman of the plaintiff.

And, the plaintiff performed his part of the contract by supplying that machine, and was to recover the whole 15*l.* 15*s.*, the price of the patent right.

The defendant sent to the plaintiff, the patentee of an invention known as “ Chanter's smoke-consuming furnace,” the following written order:—“ Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right 15*l.* 15*s.*; ironwork not to exceed 5*l.* 5*s.*; engineer's time fixing, 7*s.* 6*d.* per day.” The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of a brewery, and was returned to the plaintiff:—*Held*, (no fraud being imputed to the plaintiff), that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of a brewery; but that, the defendant having defined by the order the particular machine

Exch. of Pleas, plaintiff. On the plaintiff's applying for payment
 1838. following letter was written to him by the defence
 CHANTER attorney :

HOPKINS.

" Sir,

St. Ives, 28th Dec. 18

" By your contract with Mr. Hopkins, you were to do the work to his furnace in such a way, that there should be a great saving of coals; that there was to be no more smoke than from a common chimney; that considerable time was to be saved in the work of the brewery, and that there was to be less labour at the furnace. Instead of these advantages, the new furnace consumes quite as much coals as the old one; there is quite as much smoke; and there are several hours' more time consumed in brewing. In consequence of this, there is a vast deal more labour at the furnace, and the copper is very much injured. Under these circumstances, we are directed by Mr. Hopkins to apply to you for compensation; and unless the same be made, and the old furnace restored, within seven days from this day, an action will be brought against you for the injury sustained.

The firm of which the plaintiff was a member, replied as follows:

" Gentlemen,

London, 30th Dec. 18

" We are not a little surprised at the terms of the letter received yesterday in our Mr. Chanter's absence. On examining our man, we find the furnace he employed worked extremely well when he was there, but he says the fireman has a determined opposition to it, and if such is the case, the very best of inventions cannot be made an answer. We have no difficulty of sending fifty witnesses into Court to prove all we ever engaged with Mr. Hopkins; we therefore distinctly inform you, we shall enforce payment of our demand on Mr. Hopkins; and if Mr. Hopkins refuses payment, we presume you will wish the same determination sent you. You will oblige us to say Mr. Hopkins's determination; ours you have without alteration."

The defendant subsequently sent back the furnace to the plaintiff's premises in London. The plaintiff proved that his patent furnace was in much use, and was an article well known in the market; and called several witnesses of different trades, who stated that they had used the apparatus to much advantage, and that it consumed a great portion of its smoke. On the other hand, the defendant proved that it had not been of any service on his premises; and he offered evidence of conversations with the plaintiff before the order was given, for the purpose of shewing that the plaintiff knew the apparatus was to be used in a brewery, for which it was alleged that it was not suitable. No fraud, however, was imputed to the plaintiff. This evidence was objected to, but the learned Judge received it, subject to the opinion of the Court as to its admissibility. It was contended for the defendant, that under the circumstances, there was an implied warranty on the part of the plaintiff, that a smoke-consuming furnace should be furnished to the defendant which should be useful *in a brewery*. The learned Judge reserved leave to the defendant to enter a verdict for him, if the Court should be of that opinion: and, under his direction, a verdict was found for the plaintiff, damages, 15*l.* 15*s.*; the jury stating also, in answer to a question from the learned Judge, that in their opinion the patent furnace was useless to the defendant as a brewer.

Exch. of Pleas,
1838.

CHANTER
v.
HOPKINS

Byles having obtained a rule nisi to enter a verdict for the defendant, pursuant to the leave reserved, or for a new trial, or to reduce the damages,

Erle and *Saunders* now appeared to shew cause; but the Court called upon

Byles to support the rule.—The written order itself, which was accepted by the plaintiff, imports an implied

Exch. of Pleas,
1838.

CHANTER
v.
HOPKINS.

warranty that the furnace supplied to the defendant shall consume its own smoke. It is there designated "*Chanter's smoke-consuming furnace*," and the plaintiff is informed that the defendant is about to use it as a *brewer*. The circumstances under which the written contract was made, as they appear from the correspondence and the conversations with the plaintiff, were also evidence to apply the contract. They shewed that the plaintiff knew the apparatus was to be used for a brewery, and were admissible in evidence to put a sense upon the written contract, and to shew that it imported an implied warranty that the furnace should consume the smoke *in a brewery*. [*Parker, B.*—The whole turns on the construction of the written order; you cannot import any addition into it which is not in writing; and you do not impute fraud.] The written order itself, then, contains an implied warranty that the apparatus, if properly used, shall be fit for the purpose of a brewery. *Jones v. Bright* (a) is an authority strong in favour of the defendant. There the plaintiff purchased from the warehouse of the defendant, the manufacturer, copper-sheathing for a ship; and the defendant, who knew the purpose for which it was wanted, said, "I will supply you well." It was held that this was an implied warranty that the copper was fit for that purpose. *Best, C. J.*, says—"In a contract of this kind, it is not necessary that the seller should say, 'I warrant;' it is enough if he says that the article which he sells is fit for a particular purpose. But I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that it is merchantable—that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose." In the previous case of *Gray v. Cox* (b), there cited, *Abbott, C. J.*, had laid down the same doctrine.

(a) 5 Bingh. 583; 3 M. & P. 155.

(b) 4 B. & Cr. 108; 6 D. R. 200; 1 C. & P. 184.

time at Nisi Prius, and it undoubtedly appears that his opinion was not supported by the rest of the Court; but the case was decided on a different ground, viz., that an allegation of a warranty that the copper purchased should be "good, sound, substantial, and serviceable copper," was not proved by merely shewing a purchase of copper sheathing at the ordinary market price. The case of *Street v. Blay* (a) is even stronger than that of *Jones v. Bright*, since it not only assumes that the purchaser may, under such circumstances, insist on a breach of warranty, but lays it down that, if he have no opportunity of ascertaining the quality of the chattel before he orders it, he may, if it do not answer the warranty, rescind the contract and return the chattel, after having kept it a reasonable time for the purpose of trial. Lord *Tenterden* says, "It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent is such as is never completely accepted by the party ordering it. In this and similar cases, the latter may return it as soon as he discovers the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial." This was an executory contract of the kind here spoken of; it was not the case of a specific chattel, definitively ascertained and appropriated to the buyer. [*Parke, B.*—Here the written order defines the thing that is wanted; viz., a smoke-consuming furnace according to the plaintiff's patent—if that article is supplied, the order is complied with. The difference between this case and that of *Jones v. Bright*, is, that here the subject of the contract is defined, and defined accurately, by the buyer. The object for which he

Exch. of Pleas,
1838.

CHARTER
HOPKINS.

(a) 2 B. & Adol. 456.

Exch. of Pleas,
1838.

CHANTER
v.
HOPKINS.

wanted it is immaterial; that is his own affair, the article being accurately defined independently of that object. Suppose the order were for a horse to draw the buyer's carriage, would there not be an implied warranty that the horse should be fit for that purpose? [*Parke, B.*—That is not the same case as this: there the seller knows the object for which the horse is wanted, and no particular horse is specified: but suppose the buyer said, "send that bay horse in the third stall of your stable, to draw my carriage," then if it did not draw the carriage, it would be the buyer's concern.]

At all events, the evidence was admissible in reduction of damages; *Street v. Blay*. [*Parke, B.*—I do not see how you can reduce the damages; the article ordered is supplied, and the price of the patent right is fixed by the defendant himself at fifteen guineas.]

LORD ABINGER, C. B.—I think the rule must be discharged. A good deal of confusion has arisen in many of the cases on this subject, from the unfortunate use made of the word "warranty." Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description, has been called a warranty; and the breach of such contract, a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as, if a man offers to buy *peas* of another, and he sends him *beans*, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him *peas*; the contract is to sell *peas*, and if he sends him any thing else in their stead, it is a non-performance of it. So if a man were to

order copper for sheathing ships—that is a particular **copper**, prepared in a particular manner; if the seller **sends** him a different sort, in that case he does not comply **with** the contract: and though this may have been considered a warranty, and may have been ranged under the **class** of cases relating to warranties, yet it is not properly **so**. Now, in the present case, the question is, whether or **no** the order has not been complied with in its terms. **What** is the order? It is an order for one of those engines **of** which the plaintiff was known to be the patentee; he **was** not obliged to know the object or use to which the **defendant** meant to apply it; and it is admitted there is no **fraud**. If, when the plaintiff received such an order, he **had** known it could not be so applied, and felt that the **defendant** was under some misapprehension on the subject, **and** that he was buying a thing on the supposition that he **could** apply it to that use, when the plaintiff very well **knew** he could not, in that case it might affect the contract **on** the ground of the suppression of a material fact; that **might** be a question for the jury. Or if the terms of the **contract** were proposed by the plaintiff himself, such as, “I will send you one of my smoke-consuming furnaces, which shall suit your brewery;” in such case that would be a warranty that it should suit a brewery. But in this case **no** fraud whatever is suggested; and the case is that of an order for the purchase of a specific chattel, which the **buyer** himself describes, believing, indeed, that it will **answer** a particular purpose to which he means to put it; **but** if it does not, he is not the less on that account **bound** to pay for it. The seller does not know it will not **suit** his purpose, and the contract is complied with in its **terms**. It appears to me that this is the ordinary case of **a** man who has had the misfortune to order a particular **chattel**, on the supposition that it will answer a particular **purpose**, but who finds it will not. I think there is **no** **ground** at all, therefore, to disturb the verdict.

Exch. of Pleas,
1838.

CHANTER
v.
HOPKINS.

Exch. of Pleas,
1838.

CHARTER
v.
HOPKINS.

PARKE, B.—I also think there is no ground in this for disturbing the verdict. The rule of law is clear: you cannot add to or diminish a written contract by anything in parol which may have occurred between the parties. If indeed there has been any fraudulent representation, the buyer may relieve himself from the contract on ground of fraud; but here the defendant does not propose to impute fraud to the plaintiff. He cannot then be allowed to give parol evidence as to any warranty not contained in the agreement itself; and the question is then reduced to the construction of the words of the agreement as contained in the order. Now I agree with the authority which Mr. *Byles* has referred to, of *Jones v. Bright*, that an order is given for an *undescribed and unascertained* thing, stated to be for a particular purpose, which the manufacturer supplies, he cannot sue for the price, unless it answers the purpose for which it was supplied. This may be illustrated by the example which has been already referred to. Suppose a party offered to sell me a horse of such a description as would suit my carriage; he would not fix on me a liability to pay for it, unless it were a fit horse for the purpose it was wanted for; but if I described it as a particular bay horse, in that case the contract is formed by his sending that horse; and it appears that the present is a similar case. The order is—"I will send you my patent hopper and apparatus, to fit up my brick-copper with *your smoke-consuming furnace*." The machine is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending the machine; and it is the defendant's concern whether it answers the purpose for which he wanted to use it or not. On reading the contract, all the plaintiff has to do is to send the patent machine, and whether it answers the purpose for the defendant or not, with that the plaintiff has nothing to do; he has furnished the machine contracted for, and is entitled on that contract to recover the stipulated

namely, fifteen guineas. On these grounds, it appears to me that the verdict was right, and that the rule ought to be discharged.

Esch. of Pleas,
1838.

CHARTER
v.
HOPKINS.

GURNEY, B., concurred.

Rule discharged.

BLOW v. WYATT.

C. TURNER had obtained a rule to shew cause why the plaintiff should not pay the costs of the day for not proceeding to trial, under the following circumstances:— Two actions of trespass had been brought by the plaintiff against the defendant, one in the Court of Queen's Bench, the other in this Court. The plaintiff took down both these causes to trial at the last Summer Assizes, and entered them in the Marshal's list, in the above order. The defendant also took down the cause in this Court by proviso, and entered it in the Marshal's list next after the plaintiff's entry of the same cause. The action brought in the Court of Queen's Bench was tried first, and whilst the jury had retired to consider their verdict, the associate reached the cause as entered by the defendant, the plaintiff having withdrawn his record in the action in this Court; but on its being called on, by agreement between the plaintiff and defendant, it was made a remanet.

Where a cause is taken down to trial by both parties, and the plaintiff withdraws his record, the defendant is entitled to costs of the day, although he might have proceeded to try the cause upon his own entry of it by proviso. But he is not so entitled when, by consent of both parties, the cause was made a remanet.

Channell shewed cause.—Although the plaintiff withdrew the record as entered by him, yet the defendant's entry of it remained; and as the cause was reached, he had an opportunity of trying it and disposing of it; his not proceeding to trial was therefore his own fault, and he has no right to the costs of the day for the plaintiff's not proceeding to trial.

C. Turner, contra.—When the record is taken down by both parties, the cause entered by the plaintiff, if

Exch. of Pleas,
1838.

BLOW

^{vs.}
WYATT.

entered in time, is the one which ought to be tried and the defendant is bound to be there with his witnesses, and is entitled to the costs of the day if the plaintiff fails to try the cause: *Rex v. Macleod* (a) Tidd's Pr. vol. 2, pp. 759, 760, (9th edition); *Rex Halse* (b). In the Common Pleas costs are allowed to the defendant though he enter a *ne recipiatur*. So also, in the King's Bench and Common Pleas, where the plaintiff had a special jury, and neither party prayed a *talea* (Tidd's Pr. 759.) And in the Common Pleas, where both the plaintiff and defendant gave notice, but neither of them went on to trial, it was holden that they were both entitled to costs. (Ibid.) That is expressly in point, and for it is cited the Practical Register, 405. That book has been referred to in the Inner Temple Library. The case was *Reading v. Grafton*, Michaelmas, 13 Geo. 1, and it is as follows: "Cooke.—The judges were moved in the Treasury, for their directions to the prothonotary, in taxing costs, both for the plaintiff and defendant not going to trial. The case was this: the defendant gave notice of trial by proviso; the plaintiff also gave notice of trial; neither went on to trial or countermanded, and both got rules for costs for not proceeding to trial. Sir George Cooke, prothonotary, doubted whether both were entitled to costs; and the judges were of opinion, that as both sides gave notice of trial, so likewise both sides were entitled to costs for not going on to trial." According to that authority, the defendant is clearly entitled to his costs, and if the plaintiff has a right to his costs from the defendant, he may make that the subject of a distinct motion.

PER CURIAM.—When the plaintiff withdrew his record, the defendant might have tried his cause by proviso, and therefore he cannot allege that he has lost a trial by the

(a) 2 East, 206 (n).

(b) Ry. & M. 20.

plaintiff's default. According to the authority referred to, both parties would be entitled to the costs of the day, and we were at first disposed to enlarge this rule for the purpose of enabling the plaintiff to make a cross motion: but we are now of opinion that the parties having, by agreement between them, consented to make the cause a remanet, that distinguishes it from the authority relied upon, and this rule ought to be discharged.

Exch. of Pleas,
1838.

BLOW
v.
WYATT.

Rule discharged.

HITCHMAN v. WALTON.

CASE.—The first count of the declaration stated, that a certain messuage and premises at Hampstead were in the possession and occupation of one James Pett, as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff, and that while they were so in the possession and occupation of the said James Pett, the defendant pulled down, removed, and destroyed certain fixtures being on the said premises, and in so doing, dilapidated, injured, and destroyed the said messuage and premises, and afterwards converted and disposed of the said fixtures to his own use. The second count was in trover for fixtures, chattels, and effects of the plaintiff. Pleas, 1st, not guilty; 2ndly, to the first count of the declaration, that the premises in that count mentioned were not in the possession and occupation of the said James Pett, as tenant thereof to the plaintiff, in manner and form &c.; 3rdly, to the second count, that the plaintiff was not possessed as of his own property of the said fixtures, &c., in manner and form &c.; on which issues were joined.

Where a lessee for years mortgaged his lease, and all his estate and interest in the premises, and afterwards became bankrupt:—*Held*, that the mortgagee might declare in case as reversioner against the assignee of the tenant, for the removal of fixtures from the premises, whereby they were dilapidated and injured; and that he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before

the execution of the mortgage, although there was a covenant in the original lease to the mortgagee, to yield up to the lessor, at the determination of the term, "all fixtures and things to the premises belonging or to belong."

Exch. of Pleas,
1838.

HITCHMAN
v.
WALTON.

At the trial before *Gurney, B.*, at the Middlesex sittings after Trinity Term, the following facts appeared:— By indenture of lease, dated 5th July, 1831, one Masters demised the premises in question to Pett for the term of twenty years, subject to a covenant by Pett “to surrender and yield up the said messuage or tenement and premises at the end of the said term thereby granted, in a good state of repair and condition, together with all partitions, doors, windows, casements, bells, bars, hinges, locks, keys, shelves, dressers, pumps, pipes, cisterns, *and all other fixtures and things*, to the said messuage or tenement, or any part thereof, belonging *or to belong*, reasonable use and wear thereof in the mean time only excepted.” Pett entered and occupied under this demise, and in September, 1832, assigned to the plaintiff by way of mortgage, for securing a sum of 300*l.*, the lease, and all the estate, right, title, and interest of him, Pett, in the premises, subject to a proviso for making void such assignment on payment of the principal and interest in September, 1833. The mortgage money was not then paid; but Pett continued in the occupation of the premises until November 1837, when a fiat in bankruptcy was issued against him. The defendant was chosen his assignee under the fiat, and by his directions all the fixtures on the premises were taken down and removed; and it appeared that in the removal of them damage was done to the premises to the amount of about 3*l.* The landlord’s fixtures (those which were on the premises at the time the lease was granted) were proved to be of the value of 4*l.*; the tenant’s fixtures (all of which had been put up before the assignment to the plaintiff) of the value of 59*l.* 10*s.*; and for the recovery of these several items of damage the present action was brought. It was contended for the defendant, that the action was not maintainable; first, because Pett was not such a tenant of the plaintiff as that a reversion was incident upon the tenancy, and therefore the first count could not be sustained; and as to the second

if he were treated as tenant, he, and consequently his assignees, might remove the fixtures (*a*). The judge declined to nonsuit, and under his direction was found for the plaintiff, damages 66*l.* 10*s.*, being reserved to the defendant to move to enter a rule to reduce the damages.

Exch. of Pleas,
1838.

HITCHMAN
v.
WALTON.

Having obtained a rule nisi accordingly,

W. and G. T. White shewed cause.—The plaintiff was entitled to retain his verdict for the full amount. *v. Bere* (*b*) is a distinct authority to shew that a mortgagor is considered in law as the tenant of the mortgaged premises, at least, he so treated by him at his election. Being so, the issue on the second plea was rightly given for the plaintiff, and under it he was clearly entitled, as plaintiff, to recover for the amount of injury done to his premises. And he is equally entitled to recover on the count in trover. The cases of *Steward v. Colegrave* (*c*), *Dios Santos* (*d*), and *Boydell v. Boydell* (*e*), shew that fixtures pass by a conveyance of the premises to which they are affixed, unless some intention to the contrary be expressed. Here Pett mortgages to the plaintiff both his lease and his tenant-right—all that he has as lessee and as tenant. Independently of the tenant-right contained in the lease, if it had expired and he became bankrupt, he would have had the right to remove the fixtures put up by himself: that is a right which he derives out of his occupation of the premises, and it passes to a mortgagee. [*Parke, B.*, referred to *W. v. Meagoe* (*f*) as an authority to that effect].

Subsequently appeared
that was made under a
proposition that the fix-
tures put up after the exe-
cution of the mortgage to the

(*b*) 5 B. & Ald. 604.

(*c*) 1 Brod. & B. 506; 4 Moore,
281.

(*d*) 2 B. & Cr. 76; 3 D. & R. 255.

(*e*) 1 C. M. & R. 177.

(*f*) 2 Ad. & Ell. 167.

Exch. of Pleas,
1838.

HITCHMAN
v.
WALTON.

It is equally clear that trover will lie for fixtures in their severed state, and that, under the circumstances of the present case, they would not pass to the assignee as being within the order and disposition of the bankrupt.

Platt, contra.—First, there was not such a tenancy as between Pett and the plaintiff, as entitles him to declare in the character of reversioner. The mortgagor is at most merely tenant at sufferance to the mortgagee, and that is not a tenancy to which a reversion is incident. In *Wilkinson v. Hall* (a), there was a proviso in a mortgage deed that the mortgagor should be allowed to remain in possession for seven years, if the interest were regularly paid during that time; and that was considered as in effect a lease for seven years. But here the period limited for payment of the mortgage money had expired, and the legal interest had vested absolutely in the mortgagee. Under those circumstances, the mortgagor has not any interest on which a reversion is incident. The term *reversion* has a strict legal sense—it means the reverting of the estate to a party who has granted out a portion of it. But none is so granted to the mortgagor—his possession after default is the possession of the mortgagee. No term is carved out of the estate of the mortgagee. An ejectment might be maintained by him against the mortgagor without any demand of possession; and for the same reason he might maintain trespass; for an ejectment includes in it a trespass. The party who can at once turn another out of possession of premises, may maintain trespass for a wrong done to them.

Secondly, the lease itself here provides that the fixtures, whether existing at the date of the lease or to be put up afterwards, shall belong to the lessor. Pett had merely the right to the use of them during the term. No

(a) 3 Bing. N. C. 508 ; 4 Scott 301.

interest in them, therefore, could pass to the plaintiff by the mortgage. *Exch. of Pleas, 1838.*

HITCHMAN
v.
WALTON.

LORD ABINGER, C. B.—I am of opinion that this rule must be discharged. The case has been very ingeniously argued by Mr. *Platt*, but I think his argument is met by several answers. The defence set up by the first plea is, that Pett was not the tenant of the plaintiff. Now, if a mortgagor be not tenant to the mortgagee, in what relation does he stand? He is not a trespasser; he is not a servant, because the mortgagee is not in possession: the ordinary terms known to the law are, a mortgagee *in possession* and *out of possession*. Then look at the very terms and understanding of a mortgage. It is either made so as to vest the absolute interest in the mortgagee, without any proviso for a future defeasance on non-payment of the mortgage money: if so, the mortgagee becomes the absolute legal owner, with the right to turn out the mortgagor at once; but if he chooses to allow him to remain in possession, in what character does he stand but that of a tenant, since it is clear he is neither a trespasser nor a servant? On the other hand, if there be a stipulation that he shall be allowed to remain in possession for a time, by the very terms of the deed, he is a tenant for that time, and is in possession for a *term*; if he continues in possession, and holds over, he continues on the same terms as during that time. Then how is the mortgagee to declare for an injury to his ownership? He must either declare as reversioner, as it was held in *Partridge v. Bere* that he might, or else he must set out all the special circumstances at length: the former is by much the more convenient mode. Mr. *Platt* says, that in order to constitute a reversion there must be a portion of the estate carved out, on which the reversion shall be incident; the answer is, that the portion of the estate carved out is the portion of time during which the mortgagor is allowed to remain in pos-

Exch. of Pleas,
1838.

HITCHMAN
v.
WALTON.

session, and the mortgagee must determine the will before he can turn him out. No doubt he may maintain ejectment without any previous demand of possession; but the ejectment is maintained on the fiction that the lessor admitted, by the consent rule, to have entered into possession, and to have been afterwards ousted. I think, therefore, that the first issue was rightly found for the plaintiff; and if so, it is clear that upon that issue he had a right to recover the amount of any damage done to the freehold by the improper removal of the fixtures in question.

Then we come to the count in trover. Mr. *Platt* contends that by the terms of the lease to Pett, the fixtures, even such as should afterwards be put up by him, belonged to his landlord Masters, and therefore could not be recovered by the present plaintiff. But the landlord has no right to the possession of them until the determination of the term; during the term, the tenant might sue for the value of them in trover, or might recover in trespass against any person who wrongfully removed them: and if he mortgages them during the term, his mortgagee acquires the same rights, and he also may therefore sue for them in trover. Besides, as he is bound by the terms of the lease to make them good at the end of the term, on that ground also, it seems to me that he has a right during the term to recover the value of them if they are taken away. Then with regard to the amount of the damages, we need not enter into the question as to any supposed distinction between landlord's and tenant's fixtures, because it is clear that if the tenant be permitted by the landlord to have possession of them, subject to the landlord's right of property in them, they do not pass to his assignees as being in his order and disposition; on the contrary, he holds them under a special contract, which prevents them from being within his power of disposition at all. On the whole, therefore, I am of opinion that the plaintiff is entitled to retain his verdict for the full amount.

PARKE, B.—I am of the same opinion. This is an action on the case by a party who sues as reversioner for an injury to his reversion ; and the first count alleges that **Pett** was in the occupation of certain premises as tenant to the plaintiff, the reversion being in the plaintiff, and that the defendant pulled down and removed certain fixtures on the premises, and thereby dilapidated and injured the premises, and converted the fixtures to his own use. To this count the defendant has pleaded two pleas, first, not guilty, and secondly, that Pett was not in occupation of the premises as tenant to the plaintiff as alleged in the declaration. As to the first, there is no doubt that the defendant, by his agents, removed the fixtures in question, therefore the plaintiff is clearly entitled to a verdict on the plea of not guilty. The second plea brings into question the point whether a mortgagee may consider the mortgagor as his tenant. Now, it is quite sufficient for the determination of this case to say, that it has been decided by the Court of King's Bench, in the case of *Partridge v. Bere*, that he may. In that decision I quite concur ; it is enough, therefore, for the determination of the present case to say, that that case establishes that he may treat his mortgagor, as against a stranger, as his tenant at will : he is not bound to do so, and therefore it is that he may bring ejectment against him as a trespasser, without a previous demand of possession. This issue, therefore, is made out in favour of the plaintiff. And even if the defendant could have shewn that the fixtures belonged to him as assignee, he would still be without defence unless he had pleaded specially.

We then come to the count in trover. Now the ground on which the rule was granted was, that the fixtures in question were supposed to have been put up after the date of the mortgage ; it now appears, however, that they were affixed before the mortgage was granted, and therefore the point on which the rule was granted does not

Exch. of Pleas,
1838.

HITCHMAN
v.
WALTON.

Exch. of Pleas,
1838.

HITCHMAN
v.
WALTON.

arise. There is no doubt that by a conveyance, whether to a purchaser or to a mortgagee, fixtures annexed to the freehold will pass, unless there be some words in the deed to exclude them. *Colegrave v. Dios Santos* is an authority to that effect in the case of a purchaser, and *Longstaff v. Meagoe* in the case of a mortgagee. Then it is said that, under the terms of the original lease to the bankrupt, all the fixtures, as well those which should be afterwards put up during the term, as those which were upon the premises at the date of the lease, belong to the landlord. And I am certainly disposed to think that on the strict construction of the lease it is so, although there can be little doubt that it is contrary to the intention of the parties, who probably had in their contemplation only what are properly called landlord's fixtures, but have omitted to distinguish between the two kinds. The difficulty, however, if any exist, is removed by the decision in *Boydell v. M'Michael*, where it was held that a tenant has, during the term, a sufficient interest in the fixtures to entitle him to maintain trover against a third party who wrongfully removes them, although at the end of the term he may be bound to leave them for the use of the landlord. Here, also, that interest, which has passed to the mortgagee of the tenant, enables him during the term to maintain trover, although at the end of the term he is bound to restore them to the landlord: and the measure of damages is the value of all the fixtures; for, ex concessis, he is bound to leave them all on the premises, and therefore he is to be indemnified for the loss of them.

GURNEY, B., concurred.

Rule discharged.

Exch. of Pleas,
1838.

CALVERT v. BAKER.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 40*l.*, not stated to be made payable at any particular place. There was also a count on an account stated. Plea to the first count, that the defendant did not accept the said bill of exchange in the declaration mentioned, in manner and form, &c.; to the second count, non assumpsit. At the trial before *Alderson, B.*, at the Middlesex sittings in this term, the drawer of the bill was called as a witness for the defendant, and proved that the bill, having been in the first instance accepted generally, was subsequently altered by him (the drawer) by the addition of the words "payable at Williams & Co., bankers." The bill, on being presented at Williams & Co.'s, was not paid; and it was proved that on notice being given to the defendant of the dishonour, and application made to him for payment of the bill, an answer in the following terms was received from his attorney:—

"Sir—Mr. Baker, of Bulbrook, has placed in my hands your letter relative to the dishonour of his bill for 40*l.*: he never made that bill payable at Williams & Co.'s, nor any other place in town, but refused to pay it except at his own house. The bill must therefore have been altered as to the acceptance, and he will take such steps as the law will authorize on the subject. He has been prepared for payment, and the party may have his money by calling at Bulbrook."

No application for the money to the defendant at Bulbrook was proved. The jury found that the alteration was made without the defendant's consent, and, under the direction of the learned Judge, found a verdict for the defendant.

In an action by indorsee against acceptor of a bill (not stated to be payable at any particular place), it is a good defence, under a plea that the defendant did not accept the bill declared on, that after he had accepted it generally, it was altered without his knowledge, by the addition of a memorandum making it payable at a banker's.

The acceptor of a bill, on application to him for payment, answered that the bill had been altered as to the acceptance by being made payable at a particular place; that he never made it payable there, nor elsewhere than at his own house, and that he should take such steps as the law would authorize on the subject; that he had been prepared for payment, and the party might have the money by calling at his house:—*Held*, that this letter was no acknowledgment of a subsisting debt, so as to support a count on an account stated.

subsisting debt, so as to support a count on an account stated.

Exch. of Pleas,
1888.

CALVERT
v.
BAKER.

R. V. Richards now moved for a new trial, on the ground of misdirection. First, it was not competent to the defendant, under the plea of non-acceptance, to set up as a defence that the bill had been thus altered. If he intended to rely on the circumstance that the bill, having been once valid so as to charge him, was afterwards made invalid by the alteration, so as to require a new stamp, that was a matter in confession and avoidance of the contract declared on, and ought to have been pleaded specially. *Walter v. Cubley* (a). *Cock v. Coxwell* (b) may be referred to as an authority to the contrary; but there the bill declared on was the bill *as altered*, viz. in the date; and on its being argued that the alteration ought to have been specially pleaded by the defendant, as in *Atkinson v. Hawdon* (c), *Alderson, B.*, said—"He *has* pleaded it specially, by saying that he did not accept the bill you declared on and produced in evidence, but a different one." [*Parke, B.*—On the plea of non est factum, cannot an alteration in the deed after its execution be given in evidence? It may however be said, that this plea is in the *present* tense; but here the declaration suits the bill as well in the one form as the other; but you do not produce in evidence any bill the defendant ever accepted; he says he never accepted the altered bill.] At all events, the letter of the defendant's attorney was evidence to charge the defendant on the account stated, being an admission that 40*l.* was due from him to the holder of the bill: *Highmore v. Primrose* (d), *Clayton v. Gosling* (e).

Lord ABINGER, C. B.—The first question is, whether the forged addition to the acceptance makes the acceptance itself a nullity. The plea in substance is, "I did not accept the bill in the manner you charge:" and the plain-

(a) 2 C. & M. 151.

(b) 2 C. M. & R. 291.

(c) 2 Ad. & Ell. 628.

(d) 5 M. & Sel. 65; 2 Chit. R. 333.

(e) 5 B. & Cr. 360; 8 D. & R. 110

tiff proves a bill in the form in which he did not accept it; his plea is therefore made out. As to the other point, the letter contains no acknowledgment of a liability on the bill; the defendant denies any obligation to pay at the banker's, but says he will pay at his own house if it be presented there.

Exch. of Pleas,
1838.

CALVERT
v.
BAKER.

PARKE, B.—I am of the same opinion. In *Highmore v. Primrose* there was an admission of a subsisting debt between the parties; here the defendant denies any liability to pay, unless after a condition previously performed by the other party. It is quite clear there is here no engagement to pay on request, either express or implied.

Rule refused (a).

(a) See *Dawson v. M'Donald*, 2 M. & W. 26; *M'Dowall v. Lyster*, Id. 52; *Field v. Woods*, 7 Ad. & Ell. 114.

Foss v. RACINE, LONG, HARRISON, and Another.

TRESPASS for breaking and entering the plaintiff's house, and taking his goods. Plea, not guilty. At the trial before *Alderson*, B., at the Middlesex Sittings in this term, it appeared that the plaintiff was a weekly tenant to the defendant Long of a house, and became seventeen weeks' rent in arrear; that Long having been called upon by the defendant Racine, who was the collector of land-tax for the district, for a sum of 2*l.* 11*s.*, due for land-tax in respect of this house, refused to pay it, on the ground that he could get no rent, and sent Racine, in company with the other defendant, Harrison, (who was a broker employed by Long to distrain on the plaintiff for the rent) to obtain the land-tax from the plaintiff. Racine and Harrison accordingly came to the house, and the former having knocked at the door and demanded the

A collector of taxes cannot break open a house for the purpose of taking a distress for land-tax, under the 38 Geo. 3, c. 5, s. 17, without the presence of a constable

Exch. of Pleas,
1838.

FOSS
v.
RACINE.

tax, and obtained no answer, broke open the door, which was locked, and went in. Long immediately afterwards came in and paid Racine the 2*l.* 11*s.*, and having made his distress, the parties withdrew from the premises. It was contended for the defendants, that, under the statute 38 Geo. 3, c. 5, s. 17, the defendant Racine was authorized to break open the door for the purpose of levying for the land-tax. The learned Judge thought otherwise, but gave the defendants leave to move to enter a nonsuit, and a verdict passed against the three defendants above named.

Platt now moved accordingly.—The question in this case depends on the construction of the Land Tax Act, 38 Geo. 3, c. 5, s. 17, which enacts, that, on making distress for arrears of land-tax, it shall be lawful for the collectors “to break open, in the day time, any house, and, upon warrant under the hands and seals of any two or more of the commissioners, any chest, trunk, box, or other thing where any such goods are, calling to their assistance the constable, tything-man, or headborough, within the counties, ridings, cities, towns, or places, where any refusal or neglect shall be made:”—and the question is, whether this last provision is to be confined to the case of breaking open a chest, &c. within the house, or to be extended also to the case of breaking open a house, so as to render it necessary in either case to have the presence of a constable. If it be construed in the latter sense, the rest of the section would go to shew that a distress cannot even be made without a constable being present.

Lord ABINGER, C. B.—The clause is certainly ambiguous, but I think the latter words override the whole of it. Or if the words “and upon warrant &c., any chest, &c., where any such goods are,” be placed within a parenthesis, it seems as if the party is authorized by his gener

warrant to break open any house, calling to his assistance the constable or headborough, in order to keep the peace, but requires a special warrant to break open any chest, &c., in which the goods are.

Exch. of Pleas,
1838.

Foss
v.
RACINE.

PARKE, B.—I also think that the latter words override the whole clause. There is more reason for requiring the presence of a constable when the house is broken open, than in the other case.

Rule refused.

ELIZABETH BARKER, WILLIAM BRUTON WROTH, and ANNA MARIA, his Wife, v. GREENWOOD and Another.

DEBT for the use and occupation of a farm situate at Hurst, in the county of Berks. Pleas, 1st, *nunquam indubitati*; 2ndly, payment; 3rdly, a set-off; 4thly, that the defendants were chargeable only as executors of Charles Greenwood, and alleging a set-off for money due to them as executors. The replications took issue on three several pleas.

At the trial before *Patteson, J.*, at the last Berkshire assizes, it appeared that the plaintiffs sued as devisees in trust under the will of the Rev. Francis Barker, who died in 1830. The will contained the following devise: "I give and devise unto my wife, Elizabeth Barker, my daughter, Anna Maria Wroth, wife of the Rev. William Bruton Wroth, of Eddlesborough, in the county of Bucks, clerk, and the said W. B. Wroth, and their heirs, all and every my messuages, cottages, closes, farms, lands, grounds, hereditaments, and premises whatsoever, situate in Hurst,

A testator devised lands to his wife E. B., his daughter A. W., and W. B. W. her husband, and their heirs, to hold to them and their heirs, on trust, to permit and suffer his said wife E. B. to receive and take all the net rents and profits during her life to her own use, subject to a rent-charge of 100*l.*, payable to his said daughter A. W. under her marriage settlement; and from and after the decease of his said wife, upon further trust to permit and

suffer the said A. W. to receive and take all the net rents and profits to her sole and separate use for life, independent of her husband: and from and after her decease, upon further trust, to permit and suffer the said W. B. W. to receive and take all the net rents and profits to his own use for his life: with remainder to their children in tail. A power of sale was given to the trustees, which required the purchase-money to be invested in the funds in their names: and after the decease of the wife, a power of appointment of new trustees was given to A. W. and W. B. W., or the survivor of them:—*Held*, that the trustees took the legal estate immediately on the death of the testator.

Exch. of Pleas,
1838.

BARKER
^{r.}
GREENWOOD.

in the county of Berks, and elsewhere in the united kingdom of Great Britain and Ireland, with their and every one of their rights, members, and appurtenances, to hold to the use of my said wife, Elizabeth Barker, my said daughter, Anna Maria Wroth, and the said William Bruton Wroth, and the survivors or survivor of them, and the heirs of the survivor; on trust to permit and suffer my said wife, Elizabeth Barker, to receive and take all the net rents and profits of my said devised real estate, during the term of her natural life, to and for her own use and benefit, subject, nevertheless, and without prejudice to a certain rent-charge or annual payment of 100*l.* to my said daughter, Anna Maria Wroth, out of my said real estate, or some part thereof, under and by virtue of the settlement made on her marriage; and from and after the decease of my said wife, upon further trust to permit and suffer my said daughter, Anna Maria Wroth, to receive and take all the net rents and profits of my said real estate for and during the term of her natural life, to and for her own sole, separate, personal, and peculiar use and benefit, independent of her present or any future husband; and from and after the decease of my said wife and my said daughter, upon further trust to permit and suffer the said William Bruton Wroth to receive and take all the net rents and profits, &c. for and during the term of his natural life, to and for his own use and benefit; and from and after the decease of the survivor of them my said wife, my said daughter, and the said William Bruton Wroth, I do give and devise, &c. unto and equally amongst all and every the child or children of the body of my said daughter, Anna Maria Wroth, by the said William Bruton Wroth begotten or to be begotten, as shall be living at the time of the decease of the survivor of them, my said wife, my said daughter, and the said William Bruton Wroth, and the lawful issue of any of the said children of my said daughter as shall be then dead, in equal proportions, share and share alike, such issue

heless standing in the place of and taking only the
r share which his, her or their deceased parent or
s would have had or been entitled to if they were

Exch. of Pleas,
1838.

BARKER
GREENWOOD.

There was then a power of sale given to the trus-
which required the purchase-money to be invested in
nds, in their names; and also the following proviso
e appointment of new trustees:—"Provided also,
do hereby declare my will and meaning to be, that
und after the decease of my said wife, it shall and
e lawful to and for my said daughter, Anna Maria
r, and the said W. B. Wroth, or the survivor of
by any deed or writing to be by them, him, or her,
stively duly signed, sealed, and delivered in the pre-
of, and to be attested by, two or more credible wit-
s, to nominate and appoint one or two fit and proper
r or persons to be a trustee or trustees for the pur-
of this my will."

was contended for the defendants, that upon the
r construction of the will, the legal estate was exe-
in Mrs. Barker during her life, and that she ought
ore to have sued alone. The learned Judge re-
l the point, and a verdict was given for the plaintiffs,
ges 256*l.* 6*s.* 8*d.*, with leave to the defendants to
to enter a nonsuit.

Whitt having obtained a rule nisi accordingly, citing
ughton v. Langley (a), *Doe d. Leicester v. Biggs (b)*,
1. *Greatrex v. Homfray (c)*, and *Bridges v. Wot-*
(d),

How, Serjt., and *Lumley* shewed cause.—The only
ion is, who takes the legal estate under the will
g the life of the testator's widow: that is to be col-

^a Lord Raym. 873.

^b Taunt. 109.

(c) 6 Ad. & E. 206; 1 N. & P. 401.

(d) 1 Ves. & B. 137.

Exch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

lected from the words of the will, if possible, calling for aid, where there is any ambiguity in the words, the plain intention of the testator evinced throughout the will, unless such intention cannot be supported without putting a forced construction upon the words he has used. It is submitted, then, that the first use is executed in the trustees, and that they take the legal estate as tenants in common in fee. It is the case of a devise to A., B., and C. to hold to A., B., and C.: that is equivalent to a devise to the use of A., B., and C. Suppose it had been a devise to A., B., and C., habendum to E., F., and G., the latter would not take the same estate as the former, but the use would be executed in E., F., and G. In the second limitation different words are used, viz. "to hold to them the said [trustees] and the survivors and survivor of them, and the heirs of the survivor," which would make them joint tenants, and not tenants in common. It must be admitted, therefore, that the will is inartificially drawn. Next comes the declaration of trust—"to permit and suffer my said wife to receive and take all the net rents and property of my said real estates during her life, to and for her own use and benefit." It cannot be disputed that, in ordinary circumstances, by a devise to A. in trust to permit B. to receive the rents, the legal estate is executed in B.; *Doe v. Biggs*, *Doe v. Homfray*. But here, it is only to permit her to receive, not all the rents, but all the *net* rents and profits. All outgoings and expenses, therefore, attending the management of the farm, or any quit-rents, are to be first payable, and are not to fall upon her. No person other than the trustees is pointed out who is to pay them; it seems to follow that they are to be paid by the trustees out of the *gross* rents, which, for these purposes, they are first to receive; and to do so they must have the legal estate: *Shapland v. Smith* (a). The next trust, in favour of Mrs. Wroth, is

(a) 3 Bro. Ch. C. 75.

introduced with the words—"and upon further trust"—shewing by reference that it is to be of the same nature as the preceding one: and thereby Mrs. Wroth is to receive "the net rents and profits for her own sole and separate use," which clearly would render it necessary that trustees should have the legal estate. *Harton v. Harton* (a). If then the testator intended, as he must be taken to have done, that they should take the legal estate under the second limitation, it is a reasonable inference that the former clause was governed by the same intention, the same language being used in it. But further, if Mrs. Barker takes the legal estate, then, if she commit an act of forfeiture, the estate will devolve on Mrs. Wroth as the heir at law, and she will not take to her separate use, as the testator has directed, but her husband, by his marital right, will have the control over the rents and profits, at all events during the life of Mrs. Barker, from which the testator has by express words excluded him. Again, on the death of the survivor of the three, there are contingent remainders to the children of Mrs. Wroth. How are they to be preserved but by giving the legal estate in præsentia to the trustees? In *Briscoe v. Perkins* (b), there was a devise to trustees, their heirs and assigns, for the life of the testator's son, to the intent to support the contingent remainders after limited, so that the same might not be destroyed, in trust to permit and suffer the son to receive the rents and profits for his own use during his life: and it was held, that, notwithstanding the latter words, the trustees took the legal estate to the intent to preserve the contingent remainders. No such intent is expressly stated in this will; but such an expression must be implied in order to carry into effect the manifest intention of the testator. The power of sale given to the trustees also leads to the inference that the testator intended to give

Exch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

(a) 7 T. R. 652.

(b) 1 Ves. & B. 85.

Exch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

them the estate. It is directed that on the sale of any of the real estates, the purchase-money shall be invested in the funds, not in the name of Mrs. Barker, if living, but in the names of the trustees. The cases cited on moving for the rule are all distinguishable from the present.

Broughton v. Langley, there was no more than the naked creation of a trust to permit A. to receive the profits; a remainder being also given to the heirs of A., clearly had the use executed in them, it was construed to be one entire use executed by the statute, to prevent the incongruity of holding it to be a legal estate in the trustees during A.'s life, but an estate tail in his children. The same reason would apply here, to vest the whole use in the trustees. The general principle laid down in *Doe v. Biggs* and *Doe v. Homfray*, is not disputed, but they are distinguishable on the grounds already stated. In *Bridges v. Wotton*, the trusts of the will were not set out, and there was no decision on this point. Here the intention of the testator, to be gathered from a reasonable interpretation of the whole will, was to give the trustees the legal estate, and great inconvenience must result from the contrary construction.

Maule, Tyrwhitt, and Bros, in support of the rule.—The testator has expressed a clear intention to give the legal estate to the wife for her life, and the Court will not refine upon plain words, or give them a forced construction, in order to meet remote and possible inconveniences. This is the first trust of the will; no confusion, therefore, can arise in construing the words of it; it is not as if the first trust had been to the separate use of a married woman, when the trustees no doubt would take. The words by which the estate is given to the devisees in trust, in the first instance, are the words of limitation ordinarily employed for that purpose; and the Courts always construe them so as to give the trustees so large an estate, and

no more, as is necessary to carry into effect the purposes of the trust according to the intention of the testator. [*Parker*, B.—You need not trouble yourself as to that part of the will;—proceed to the construction of the subsequent words. Have you any authority where a devise on trust to permit another person to receive the *net* rents has been construed to vest the legal estate in that person?] The nearest case to the present is that of *White v. Parker* (a), where a devise to trustees, in trust to permit the testator's wife and daughters to receive the *clear* rents of three parts to their sole and separate use, and his son the clear rent of the fourth part, the trustees to pay all outgoings, to repair, and to let the premises—was held to vest the legal estate, as to all the four parts, in the trustees. But the active duties there imposed on the trustees, of repairing, dividing the estate into four parts, and even letting the land, effectually distinguish that case from the present: here there is no direction as to any thing to be done by the trustees. The decision must have been the same in that case if the word “clear” had not been found in the will:—see the cases collected in the note to *Jeffreson v. Morton* (b). In *Bridges v. Wotton* (c), Sir W. Grant appears to contemplate precisely this case, where he says—“It is true, there is an immediate devise to them (the trustees) of the real estate, *subject to the charges*, but not upon any trust that required their immediate interference. The first trust was to pay unto, or to permit and empower Mary Bridges to receive and take the rents and profits during her life. It is by no means clear that this was not an use executed in her.” The same doctrine is stated in *Wagstaffe v. Smith* (d). But the sense in which the word “net” is used here may be collected from other parts of the will. The testator devises in trust to permit Mrs.

Exch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

(a) 1 Bing. N. C. 573; 1 Scott,
542.

(b) 2 Saund. 11, n. 17.

(c) 1 Ves. & B. 137.

(d) 9 Ves. 520.

Exch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

Barker to take the net rents, subject to a rent-charge be paid to Mrs. Wroth under her marriage settlement; that is, he intended that she should take all the rents and the trustees of the marriage settlement should have levied the rent-charge. The distinction between a devise to a trust for A., "after payment of a rent-charge," and "subject to a rent-charge," is recognised in *Kenrick v. Flower* and *Beauclerk* (a); in the latter case, the use is executed in A. No outgoings are shewn to exist here to which the term "net rents" can have reference. It is true, the same words are used in the devise to Mrs. Wroth; but the reason is, that the charge on the land is to be commensurate with her life estate under the will; she is to receive both the rent-charge under her settlement, and, independently of it, the rents and profits under the devise. The power to appoint new trustees, which is not given until after the death of the widow, is strong to shew that the testator intended no interference on the part of the trustees during her life. With regard to the argument drawn from the effect of a contrary construction in case of a forfeiture, no doubt the remainders are contingent, and might be destroyed by a forfeiture committed by the widow, in case of her surviving the other tenants for life; but no case can be shewn in which, the testator having devised life estates in lands, without any declaration of his intention to preserve contingent remainders subsequently limited, the Courts have interposed to insert words for that purpose, and to attribute to the testator an intention which he never expressed. In *Briscoe v. Perkins* (b), there was an express declaration of the testator's intention to preserve them. Here the Court is called upon, not to put a construction upon doubtful words, but to add to words which are plain and unequivocal. With regard to the power of sale, it is manifestly a power in gross.

(a) 3 Bos. & P. 175.

(b) 1 Ves. & B. 85.

PARKER, B.—It appears to me, that when the terms of this will are carefully considered, there is no difficulty in coming to a decision on the case. The question is, whether the legal estate in the lands devised vested in the first instance in the three plaintiffs, as trustees, or whether, during the life of the widow, it vested in her by operation of the statute of uses. The learned judge who tried the cause was of opinion that it vested in the trustees, and therefore that they were the proper plaintiffs on the record. The case has now been very ably and elaborately argued, and we quite agree with him in the conclusion to which he came. There is no doubt that the general rule of law is, that wherever there is a limitation to trustees, although with words of inheritance, the trustees are to take only so much of the legal estate as the purposes of the trust require. The question here is, therefore, whether it is requisite, in order to carry into effect the trusts of the will, that the trustees should take the legal estate during the life of the widow. It is now clearly settled, that where an estate is limited to trustees, and the words used are, “in trust to pay to” a specified person the rents and profits of the land, there the trustees take the legal estate; because they must receive, before they can make the required payments: but where the words are, “in trust to permit and suffer A. B. to take the rents and profits,” there the use is divested out of them, and executed in the party, the purposes of the trust not requiring that the legal estate should remain in them. That is clearly the settled law, and has so long been so, that it is not now open to inquire whether it was rightly established or not. It is also equally clear and settled, that if the testator distinctly expresses his meaning to be, that the trustees are to interfere in the execution of the trusts, and certain duties are cast upon them—if he order, for example, that they shall receive the rents, &c.—there they take the legal estate, whatever words may be used: and the case of *Gre-*

Exch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

Exch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

gory v. Henderson (a) shews that very slight circumstances of this nature are sufficient for this purpose. There the will was devised to trustees, to permit and suffer the testator's widow to receive and take all the rents and profits, and it was declared that her receipts for the rents, *with approbation of the trustees*, should be good and valid, and the Court held that the legal estate remained in the trustees on the ground that there was some duty for them to perform. In this case, the trust is not to permit and suffer the widow to receive the rents and profits, but to permit her to receive the *net* rents and profits; and the question is, whether any and what meaning is to be given to the word *net*? It has been ingeniously argued by Mr. *Tyrell*, that it was used by the testator with reference to a charge on the estate which had been created in favour of his daughter for her life, by her marriage settlement; and that the meaning of the clause was, that Mrs. Barker should receive all the rents and profits, paying out of them the money secured by this charge. The context of the will, however, if it be carefully looked at, will hardly admit of this construction. The clause itself says that the widow is to take the *net* rents, *subject nevertheless to the rent-charge of 100% a-year to the daughter*, shewing thereby that the term "*net*" was used without reference to the charge subsequently mentioned. Again, the next clause says that the daughter is to receive the *net* rents for her sole and separate use for life: and although that clause does not necessarily militate with the construction contended for by the defendant's counsel, still that is not its most natural construction. But then the further trust is, from and after the decease of Mrs. Barker and Mrs. Wroth, to permit and suffer the husband of the latter to receive and take the *net* rents and profits; and inasmuch as the rent-charge would then be extinguished and at an end, it

(a) 4 Taunt. 772.

clear that the testator could not there have used the word *net* with reference to that charge. That application of the word, therefore, being excluded, I do not know what meaning it can have, unless we understand it as distinguished from *gross*; that the trustees are to receive the *gross* rents, and after paying out of them the land-tax, and any other charges on the estate, to hand over the *net* rents to the tenant for life; and for this purpose the legal estate must remain in them during her life; it is clear that, for the purposes of the will, they will continue to have it after her death. Besides, the construction which we are now putting upon the will, will best secure the objects which the testator had in view, since it will prevent the possibility of the contingent remainders being destroyed; although I do not wish to rest the case on this ground, no case having been shewn in which the courts have construed persons to be trustees for the purpose of preserving contingent remainders, in the absence of any words by which the testator has expressed that it was with that intention he appointed them. Some stress has been laid upon the power given to Mr. and Mrs. Wroth to appoint new trustees "from and after the death of Mrs. Barker," as tending to shew that the trustees were not to interfere at all until that period: we rather think, however, that the testator merely contemplated the probability of death before that of the other trustees, whereby a deficiency would be caused in their numbers, and therefore gave the survivors the power to supply the vacancy thus occasioned. On the whole, therefore, it appears to me that, in order to carry the objects of this will into effect, the trustees took the legal estate immediately on the death of the testator, and therefore that this action has been properly brought in their names.

ANDERSON, B.—I am of the same opinion, and will only add that this decision conforms with the principle recog-

Esch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

Exch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

nised and acted on in *White v. Parker*, where a similar effect was given to the word *clear* as we give to the word *account* in the present case; although, undoubtedly, that was stronger case than the present, since there the trustees had distinct duties to perform.

GURNEY, B., concurred.

Rule discharged.

DUCKWORTH v. HARRISON.

Where an action of debt, in which the defendant had pleaded the general issue and a set-off, was, by consent, referred to arbitration, "the costs of the reference and award to abide the event," and the arbitrators found that the plaintiff was not entitled to recover in the action, and had not any cause of action against the defendant, but said nothing as to the set-off:—*Held*, that the award was final, and that the defendant was entitled to maintain an action for the costs of the reference and award.

ASSUMPSIT.—The declaration stated, that before the making of the agreement and promise thereafter mentioned, a certain action had been brought and was then pending in the Court of Common Pleas at Lancaster, wherein the now defendant was plaintiff, and the now plaintiff was defendant; and thereupon heretofore, to wit, on the 27th May, 1836, by a certain agreement made by and between the now plaintiff and the now defendant, they did agree to leave the said action to the arbitration and award of John Berry, William Bowman, and Harwood Banner, and to perform, fulfil, and keep the award, order, and determination of the said John Berry, Wm. Bowman, and Harwood Banner, or any two of them, of and concerning the said premises, so as such award, order, and determination should be made in writing and signed by the said arbitrators or any two of them, on or before the 31st of December, 1836, or on or before such other day as the said arbitrators or any two of them should by writing under their hands for that purpose appoint; and it was by the said agreement agreed that the said parties to the said agreement and their respective witnesses should be examined by the said arbitrators or any two of them, upon oath if required; and that the said arbitrators or any two of them should be at liberty to require the production of and to examine and inspect all contracts, agreements, accounts, writings, books, letters, papers, documents, and

evidences whatsoever, in the possession or power of either
 of the said parties thereto, touching or in any way relating
 to the matters in difference: and it was thereby agreed
 that the costs of the said reference and award should abide
 the event of the award. And thereupon afterwards, to wit,
 on the day and year first aforesaid, in consideration
 of the premises, and that the now plaintiff, at the now
 defendant's request, had then promised the said defendant
 to perform the said agreement and said award in all things
 on plaintiff's part to be performed; the defendant then
 promised the plaintiff to perform the same in all things on
 defendant's part to be performed. And the plaintiff saith,
 that afterwards, and before the said 31st day of December,
 1836, to wit, on the 18th of June, 1836, the said John
 Berry, William Bowman, and Harwood Banner, having
 taken upon themselves the burden of the said reference,
 did make and publish their award, order, and determina-
 tion, in writing, of and concerning the said matters in dif-
 ference so referred as aforesaid, and did respectively sign
 the same, and did thereby award and determine that the
 now defendant was not entitled to recover in the said
 action against the now plaintiff, and that the now de-
 fendant had not, at the time of commencing the said
 action, or at any time afterwards, any cause of action
 against the now plaintiff; and the now plaintiff further
 saith, that thereby the event of the said award was in
 his the plaintiff's favour: and the plaintiff furthersaith,
 that his the plaintiff's costs of the said reference and
 award, to wit, his costs thereof, which he bore and paid,
 and became liable to pay, amounted to the sum of 58*l.* 8*s.* 0*d.*,
 and that a certain sum, to wit, the sum last aforesaid, was
 afterwards, to wit, on the 3rd of August, 1836, by the said
 Court of Common Pleas, at Lancaster, taxed and allowed
 to the now plaintiff for his said costs pursuant to the said
 award: of all which the defendant afterwards, to wit, on the
 day and year last aforesaid, and before the commencement

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

ch. of Pleas,
1838.

BARKER
v.
GREENWOOD.

nised and acted on in *White v. Parker*, where a similar effect was given to the word *clear* as we give to the word in the present case; although, undoubtedly, that was stronger case than the present, since there the trustees had distinct duties to perform.

GURNEY, B., concurred.

Rule discharged.

DUCKWORTH v. HARRISON.

Where an action of debt, in which the defendant had pleaded the general issue and a set-off, was, by consent, referred to arbitration, "the costs of the reference and award to abide the event," and the arbitrators found that the plaintiff was not entitled to recover in the action, and had not any cause of action against the defendant, but said nothing as to the set-off:—*Held*, that the award was final, and that the defendant was entitled to maintain an action for the costs of the reference and award.

ASSUMPSIT.—The declaration stated, that before the making of the agreement and promise thereafter mentioned, a certain action had been brought and was then pending in the Court of Common Pleas at Lancaster, wherein the now defendant was plaintiff, and the now plaintiff was defendant; and thereupon heretofore, to wit, on the 27th May, 1836, by a certain agreement made by and between the now plaintiff and the now defendant, they did agree to leave the said action to the arbitration and award of John Berry, William Bowman, and Harwood Banner, and to perform, fulfil, and keep the award, order, and determination of the said John Berry, Wm. Bowman, and Harwood Banner, or any two of them, of and concerning the said premises, so as such award, order, and determination should be made in writing and signed by the said arbitrators or any two of them, on or before the 31st of December, 1836, or on or before such other day as the said arbitrators or any two of them should by writing under their hands for that purpose appoint; and it was by the said agreement agreed that the said parties to the said agreement and their respective witnesses should be examined by the said arbitrators or any two of them, upon oath if required; and that the said arbitrators or any two of them should be at liberty to require the production and to examine and inspect all contracts, agreements, counts, writings, books, letters, papers, documents,

as whatsoever, in the possession or power of either said parties thereto, touching or in any way relating matters in difference: and it was thereby agreed costs of the said reference and award should abide out of the award. And thereupon afterwards, to wit, day and year first aforesaid, in consideration premises, and that the now plaintiff, at the now defendant's request, had then promised the said defendant to perform the said agreement and said award in all things to the plaintiff's part to be performed; the defendant then directed the plaintiff to perform the same in all things on the defendant's part to be performed. And the plaintiff saith, afterwards, and before the said 31st day of December, to wit, on the 18th of June, 1836, the said John William Bowman, and Harwood Banner, having upon themselves the burden of the said reference, did read and publish their award, order, and determination in writing, of and concerning the said matters in difference so referred as aforesaid, and did respectively sign the same, and did thereby award and determine that the defendant was not entitled to recover in the said reference against the now plaintiff, and that the now defendant had not, at the time of commencing the said reference, or at any time afterwards, any cause of action against the now plaintiff; and the now plaintiff further saith that thereby the event of the said award was in the plaintiff's favour: and the plaintiff furthersaith, that the plaintiff's costs of the said reference and award, to wit, his costs thereof, which he bore and paid, and was liable to pay, amounted to the sum of 58*l.* 8*s.* 0*d.*, and that a certain sum, to wit, the sum last aforesaid, was paid by the defendant, to wit, on the 3rd of August, 1836, by the said Court of Common Pleas, at Lancaster, taxed and allowed to the now plaintiff for his said costs pursuant to the said award, of all which the defendant afterwards, to wit, on the 1st year last aforesaid, and before the commencement

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

the taxing and allowing of the plaintiff's costs of the said reference and award, which is an immaterial allegation, and the plea therefore contains no defence to the action; that the declaration avers that the plaintiff incurred and paid and became liable to pay certain costs of the reference and award, of which the defendant had notice, and his plea ought to have put some of those matters in issue; that even if any taxation of those costs were necessary, it was the defendant's duty to have procured such taxation, and he cannot take advantage of his own default, which, by his third plea, he attempts to do; and for that the said third plea contains new matter, and should have concluded with a verification, and not to the country.

The defendant joined in demurrer, and demurred also to the replication to the fourth plea, assigning for causes, "that it does not contain any answer to that plea, and neither traverses nor confesses and avoids it; and that the same is argumentative, hypothetical, and uncertain; and that it does not distinctly appear by it whether the plaintiff means to assert that the issues were matters referred by the agreement of reference or not; and that if it means that the issues were not matters referred as stated in the fourth plea, the allegation in that plea that they were so referred should have been traversed, and that in such case the replication should have concluded to the country; and that if it be meant that the issues were matters so referred, that the plaintiff hath not in anywise answered the plea, and that it was quite immaterial whether the arbitrators were or were not requested to make any award concerning the said issues; and for that it does not appear that the arbitrators were only to decide on the same issue, if they were required so to do; that it appears on the plea, and is confessed by the replication, that they were bound so to decide whether they were requested or not; that the replication is double, in stating two distinct matters of defence, viz. one that the issues were not matters

Lancaster, *before the making the said agreement of reference*, and that the said *issues were matters by the said agreement of reference referred, and were matters to be decided and awarded upon by the said arbitrators under the said submission*, and were matters in difference submitted to the said arbitrators: and the now defendant further says, *that the said award in the declaration in this suit mentioned and set forth is the only award ever made in, or of and concerning the premises above referred, or any of them, and that there never was any other award ever made or concerning the premises; and that the said arbitrators did not, nor did any two of them, ever decide or arbitrate, or in any manner adjudicate or award, on the said issues or either of them, save and except as in the said declaration in this cause in that behalf mentioned, which said declaration states and sets forth the whole of the material and operative part of the said award, which is not in anywise affected, altered, or varied by any other part thereof. By means of which said several premises in this plea mentioned, the said award in the declaration mentioned was and is uncertain and not final, and was and is wholly void, &c.* Verification.

Arch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

The plaintiff replied to the last plea, that the said issues in the last plea mentioned *were not, nor was either of them, matters or matter by the said agreement of reference referred, or to be decided or awarded upon by, or submitted to the said arbitrators, except or otherwise than by the said reference of the said action in the declaration mentioned.* And the plaintiff saith, that the said arbitrators were not, nor were nor was any two or any one of them, at any time during the said reference, required or *requested by the now defendant to decide, arbitrate, adjudicate, or award specifically on the said issues in the said plea mentioned, or either of them.* Verification.

To the third plea the plaintiff demurred, assigning for causes, that it traverses the averment in the declaration, of

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

the taxing and allowing of the plaintiff's costs of the said reference and award, which is an immaterial allegation, and the plea therefore contains no defence to the action; that the declaration avers that the plaintiff incurred and paid and became liable to pay certain costs of the reference and award, of which the defendant had notice, and his plea ought to have put some of those matters in issue; that even if any taxation of those costs were necessary, it was the defendant's duty to have procured such taxation, and he cannot take advantage of his own default, which, by his third plea, he attempts to do; and for that the said third plea contains new matter, and should have concluded with a verification, and not to the country.

The defendant joined in demurrer, and demurred also to the replication to the fourth plea, assigning for cause, "that it does not contain any answer to that plea, and neither traverses nor confesses and avoids it; and that the same is argumentative, hypothetical, and uncertain; and that it does not distinctly appear by it whether the plaintiff means to assert that the issues were matters referred by the agreement of reference or not; and that if it means that the issues were not matters referred as stated in the fourth plea, the allegation in that plea that they were referred should have been traversed, and that in such case the replication should have concluded to the country; and that if it be meant that the issues were matters so referred, that the plaintiff hath not in anywise answered the plea, and that it was quite immaterial whether the arbitrators were or were not requested to make any award concerning the said issues; and for that it does not appear that the arbitrators were only to decide on the same issues, if they were required so to do; that it appears on the plea, and is confessed by the replication, that they were bound so to decide whether they were requested or not; that the replication is double, in stating two distinct matters of defence, viz. one that the issues were not matters

referred, and the other, that there was no such request as
herein mentioned."

Joinder in demurrer.

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

W. H. Watson, for the plaintiff.—Two questions arise in this case; one upon the demurrer to the third plea, the other on the demurrer to the replication to the fourth plea. First, as to the replication to the fourth plea: it is not necessary to contend that this replication is good, for the fourth plea is bad. That plea raises the question whether the arbitrator in this case was bound to find specifically on each issue. The award is sufficiently final and certain if the action, which alone is referred, is determined in favour of one party or the other, without finding on each issue. It is true that where an action, in which several issues are joined, is referred to arbitration, and the costs of the action are to abide the event of the award, unless the arbitrator determines each issue, the award is bad; for, by the new rules, each party is entitled to the costs of the issues found for him, and, unless each issue is found, there is no event on which the costs of the separate issues can be taxed. But these cases will all be found to be cases where the costs of the action are to abide the event of the award. Here the costs of the reference and award only are to abide the event of the award. None of the acts of Parliament or rules of court apply to awards. The arbitrators therefore were not bound to find separately and specifically on each issue; they were only bound to determine the action, and when they found the plea of non assumpsit in favour of the now plaintiff, it was immaterial to find the set-off. Before the new rules as to pleading, if the plea of the general issue pleaded to the whole action were found for the defendant, the proper course was to discharge the jury as to the other issues, which became immaterial: *Dibben*

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

v. The Marquis of Anglesea (a). There the arbitrator had found that the defendants were not guilty of the trespasses laid, but took no notice of other issues joined in the cause, and it was held that the award was perfectly good, as there was a sufficient event. [*Parke, B.* —It was the same as if the parties had agreed to withdraw a juror as to the other issues.] In that case Lord *Lyndhurst*, C. B., says (b)—“After finding that the defendants had not committed the trespasses, any inquiry into the truth of the special pleas could only have been material with reference to the question of costs. If either party wished to have a decision upon the special issues with that view, he should have distinctly requested the arbitrator to take that course.” This replication was drawn with reference to the judgment of Lord *Lyndhurst* in that case. It has never been considered material under the statute of Anne to have all the issues entered up, provided one material issue involving the whole question was found for the defendant. If this be so, there was a sufficient event of the matters referred. In *Eardley v. Steer* (c), a cause and all matters in difference were referred, costs to abide the event of the award. The defendant had a cross demand for a larger amount than the plaintiff claimed in the action. The arbitrator awarded that the action should cease, and be no further prosecuted; that on the balance of accounts 661*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant. The court refused to set aside the award, on the ground that it did not sufficiently determine the action. *Parke, B.*, there says—“It is said, the arbitrators have not shewn who is to pay the costs of the action; that depends on the question whether they have sufficiently determined the event, since the

(a) 2 C. & M. 722; 10 Bing. 568.

(b) 10 Bing. 570.

(c) 2 C. M. & R. 327.

costs are to follow the event; and I think we may reasonably intend that they meant to determine the event in favour of the defendant." Now, here there is a sufficient determination of the event of the award to enable the master to say in whose favour the cause is determined, and to tax the costs of the reference and award accordingly. The costs of the reference and award are to follow the event, and that event is in favour of the defendant in the action. As to the third plea, that plea is bad, for it is not shewn by the pleadings that the costs could be taxed. The Court intimated that they thought the third plea bad, and called on)

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

Crompton, contra.—The third plea is good, since it traverses the only allegation on which the plaintiff relies to shew that the defendant ever was liable to pay the costs of the reference and award. There is no other allegation which shews that there were costs due, which the now defendant was liable to pay. The declaration avers, that the plaintiff's costs of the reference, which he bore and paid and became liable to pay amounted to 58*l.* 8*s.*, and that that sum was, by the Court of Common Pleas at Lancaster, taxed and allowed to the now plaintiff, for his said costs, pursuant to the said award; and the plea states, that no such sum nor any other sum ever was taxed or allowed to the plaintiff by the said Court of Common Pleas at Lancaster, for his, the plaintiff's, costs of the reference and award, in manner and form as in the declaration is alleged. The defendant was not liable to pay these costs merely because the plaintiff was liable, for they might be costs which he was liable to pay to his own attorney, and which the defendant was not bound to reimburse. The only averment which shews any liability on the defendant to repay the plaintiff, is the averment of the taxation and allowance of that sum by the Court. That allegation is therefore material and traversable, and if it

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

were struck out, the count would be bad. But, secondly taxation was necessary before the costs could be recovered : *Sadler v. Robins* (a), *Candler v. Fuller* (b), *Biglan v. Skelton* (c). In some of these cases there was a discussion whether the costs ought not to have been taxed before particular day, but in all the cases it seems to have been considered that there must be a taxation before the bringing the action. It cannot be ascertained without taxation what is the amount of the costs to be recovered, and therefore on this ground also the allegation of taxation is material and traversable.

Thirdly, the replication to the last plea is clearly bad and the plea good. The cause having been referred, the arbitrators were bound to award upon and decide the cause and each of the issues, whether they were expressly required to do so or not. The costs of the issues are to be determined in the same manner as if the case had been tried by a jury ; and since the new rules, there must be a verdict entered on every issue. The submission is, that the costs of the reference and award shall abide the event ; and the question in this part of the case is, what is the meaning of the expression "the event of the award?" The argument on the other side is founded upon the fallacy that the event means the general sweeping result of the case. It is admitted by the plaintiff's counsel that the *event of the cause* means the legal event of the cause, and this is established by many cases, and could not have been denied. So the event here is the legal event, and the word "event" must have the same construction in both cases. If the cause is referred, the Court must look at the state of the record, and if it is a case in which issues have been joined, those issues are referred. The case is referred *secundum subjectam materiam*, to use the expression of *Tindal, C. J.*, in *Woof v. Hooper* (d), where a cause

(a) 1 Cowp. 253.
(c) 12 East, 436.

(b) Willes, 62.
(d) 4 Bing. N. C. 449.

was referred to an arbitrator to certify for whom and for what amount, if any, the verdict should be entered; it was held that the arbitrator was not confined to a general verdict, but might enter it on the several issues, according to the evidence before him. And *Tindal*, C. J., says,—“The whole cause is referred, with power to the arbitrator to enter a verdict. I think that is *secundum subjectam materiam*; and that, as the arbitrator is put in the place of the jury, he may find the verdict in the same way as the jury had power to find it.”

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

The construction contended for by the plaintiff will lead to several absurdities. Thus, supposing a large demand to be made in the declaration, and 1s. to be established in part of the claim on one part of the record, all the costs of the reference, as to the other parts of the record on which the plaintiff fails, will have to be paid by the defendant. Not only would the defendant fail in recovering the costs on the part in respect of which he succeeds, but he would have to pay the plaintiff's costs for what the plaintiff fails to establish. So, where there is a plea of set-off, in addition to the plea of the general issue, as in the present case, the plaintiff may go to great expense in bringing witnesses before the arbitrator, not only as to the question of original liability, but as to the question arising on the set-off. It is said that there is no occasion to go on in such case when the general issue is decided against the plaintiff; and also that the party should request the arbitrator to find specifically upon the other issues. It must be remembered, however, that on an arbitration, the party has no means of knowing to what conclusion the arbitrator will come upon any particular issue. The plaintiff, for instance, gives evidence to a certain extent to establish his case on the issue on non assumpsit, and, as he cannot tell what the arbitrator may decide upon as to that part of the case, he naturally goes on to give evidence in answer to the alleged set-off.

Exch. of Pleas,
1838.

DUCKWORTH

v.
HARRISON.

[*Parke, B.*—The party could have no means of knowing what the arbitrator would decide on any particular issue. That argument was not brought before the court in *Dibben v. The Marquis of Anglesea*]. According to the defendant's construction, the event of the award is a legal event of the award, and no difficulty arises from that construction, because here, on this construction, the event of each issue must be looked to; and the costs will, according to the usual course, be distributed with reference to the finding on each issue; and it may happen, that the party succeeding generally, will have on the balance to pay costs. *Norris v. Daniel* (a) is an authority in the defendant's favour. In that case, the costs of the action and of the award were to abide the event of the award; and the arbitrators found that the plaintiff had a good cause of action on five out of eight counts; that the defendant should pay 5*l.* damages; and that no further proceedings should be had in the action: and it was held that there was no award as to three counts; no event to authorize the taxation of costs on these counts; and therefore consequently, no part of the award could stand. In the present case (according to the argument of the present plaintiff) there was a result as to the recovery of 5*l.*; but that was held not to be sufficient. [*Parke, B.*—There was no finding as to whether the plaintiff or defendant would recover on the three counts]. Still there was what may be called a general result of the action. *Dibben v. The Marquis of Anglesea* is distinguishable on the ground that it was before the new rules, and in that case there was a distinct finding on the general issue; whereas it is quite uncertain on which issue the finding was made in *Dibben v. The Marquis of Anglesea* is, besides, inconsistent with *Norris v. Daniel*, which is a strong point for the defendant, unless the plaintiff can show that a different meaning ought to prevail as to the meaning of the *cause* and the *event* of the award.

(a) 10 Bing 508; 4 M. & Scott, 383.

Again, the award is not final, because it says nothing out the costs of the action. [Lord Abinger, C. B.—power is given by the submission to enter a verdict, or to determine as to the costs of the cause.] The costs of the cause are referred with the cause, but the arbitrator has left them undecided. [Parke, B.—How can costs be recovered, when there is no verdict?] They follow the general result of the cause, and might be recovered by an action. An arbitrator, although he has power to enter a verdict, has always a right to order a judgment to be entered.

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

It is also submitted that the award is not final as to the subject-matter of the issues referred, as it is not found whether there was a debt due from the plaintiff to the defendant. The present defendant may have gone before the arbitrator on that express ground. [Parke, B.—Have you found any authority that where a cause has been referred, but no power has been given to the arbitrator to enter a verdict, he has nevertheless power to order a judgment to be entered up, so as to enable the party to recover costs?] It is clear that he can order a discontinuance or a *stet processus* to be entered: *Blanchard v. Lilly (a)*. The award is not final in three respects: 1st, as to the costs of the cause; 2ndly, as to the costs of the reference; 3rdly, in not determining whether any debt was due from the plaintiff to the defendant.

Watson, in reply.—It is quite clear that an arbitrator is not bound to adjudicate as to costs. It is sufficient if he determines the event: *Eardley v. Steer*. This is a question of a contract between these parties: then the arbitrators find that the plaintiff has no cause of action against the defendant. It is clear, from that, that they have found the general issue in favour of the defendant. The *event* means the

(a) 9 Eust, 497.

Exch. of Pleas,
1838.
DUCKWORTH
v.
HARRISON.

CASES IN THE EXCHEQUER,

ultimate determination in favour of one party or the other; and the arbitrators have decided that in favour of the now plaintiff, by finding that the plaintiff in the former action had no cause of action. Then the parties, by compact, say, whoever shall be the successful party, the other shall pay the costs of the inquiry. If the case had been tried before a jury, and the jury had been discharged as to the issue on the set-off, *Powell v. Sonnett* (a) is an authority to shew that it would not be error on the record, that it did not state that the discharge of the jury was with the consent of the parties. [*Parke, B.*—A judge has no power to discharge a jury, where there are issues material to be decided. Lord *Abinger, C. B.*—I know Mr. Justice *Bayley* used to do it; but I always doubted the propriety of his doing so. It is the duty of the judge to try the issues, not to discharge the jury. *Parke, B.*—In *Rex v. Johnson* (b), it appeared that the issues on which the jury were discharged could not be material, either as to the costs or as to the rights of the parties, and therefore the judgment was affirmed]. Here the arbitrators have decided that the plaintiff had no cause of action, which rendered the other issue immaterial. There is no instance to be found, where it has not been held that a determination of the general event in favour of one party will carry the costs of the inquiry. It is not necessary to trouble the Court as to the costs of the action, as that is too clear for argument. Laying aside all other arguments, the judgment of Lord *Lyndhurst* in *Dibben v. The Marquis of Anglesea* (c), that, "if a party wished to have a decision upon the special view to costs, he should have distinctly required the arbitrator to take that course," is conclusive. *B.*—In *Doe d. Wood v. Roe* (d), it was held that a cause was referred, the arbitrator had power

(a) 3 Bing. 381; 11 Moore, 330.
(b) 5 Ad. & E. 488.

(c) 10 Bing. 570.
(d) 2 T. R. 644.

costs without any express authority for that purpose. Then, is this award final? Yes. He gives costs to neither party; he is silent as to them. That case only decides that the arbitrator has *power* to award costs; it does not say that he *must* do so.

Exch. of Pleas,
1838.

DUCKWORTH
v.
HARRISON.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

LORD ABINGER, C. B.—The question in this case turns upon the construction to be put upon a rule of reference to arbitration, by which a cause was referred, and the costs of the reference and award were to abide the event of the award. The action was brought to recover those costs, and the pleadings raised the question whether the award was final, and could be sustained. It appeared that the defendant had pleaded two pleas, the general issue and a set-off; and it was said, that as the arbitrator had found merely that the plaintiff had no cause of action, and had not decided upon each of the issues specifically, he had not in fact determined the action. The Court at first entertained some doubts upon this objection, but they have finally come to the conclusion, that if the parties had intended that the arbitrator should award distinctly upon each issue in the action, they ought to have stated it. The arbitrator has decided the action, by saying that the plaintiff was not entitled to recover; and we think that the words “event of the award” must mean the event as to the action itself, and do not mean the event as to the determination of the particular issues, which therefore become immaterial. On this ground our judgment will be for the plaintiff.

Judgment for the plaintiff.

Exch. of Pleas,
1838.

BOYDELL v. JONES.

Declaration in libel stated that the plaintiff was an attorney, and that certain orders had been made by the Court of Queen's Bench, for setting aside proceedings with costs, in an action in which the plaintiff was the attorney of the then defendant, and the defendant was the attorney of the then plaintiff, and that the costs had been ascertained and taxed by one of the Masters; that *sharp practice* in the profession of an attorney is, and is considered to be, disreputable practice, and discreditable to the attorney adopting it; yet that the defendant, intending to cause it to be believed that the plaintiff had been guilty of such sharp practice as aforesaid in the said action, and had been reprimanded for it by the Master, published the following false, *ironical*, and libellous matter:—"An Honest Lawyer" (thereby plaintiff, and meaning to represent that he was not an honest lawyer)—"A person of C. B., &c., was severely reprimanded the other day by one of the Masters of the Court for what is called sharp practice in his profession" (meaning and alluding to the plaintiff's practice with respect to the said orders, and that such practice was sharp practice as aforesaid). *Held*, that that part of the statement which imputed to the plaintiff sharp practice, was explained by the introductory matter to shew that it was libellous.

Semble, also, that the allegation that the libel was *ironical* was sufficient, coupled with the introductory matter, to shew that the phrase "an honest lawyer" was used in a libellous sense.

Where, on a special demurrer to a plea, the defendant objects that the declaration appears that there is any matter in the declaration which is good on general demurrer, sufficient to sustain the action, the plaintiff is entitled to judgment; since the case is considered as if there were a general demurrer to the whole declaration, which would, be too large.

LIBEL.—The declaration stated, that whereas the plaintiff, for a long time before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, resided and still does reside in 11, Old Shire Street, Queen Square, London, and had been and still is an attorney of the Court of the Queen before the Queen herself, and had used and carried on the profession and business of an attorney-at-law, with great credit and reputation; whereas before the time of the committing of the grievances by the defendant as hereinafter mentioned, orders had been made by one of the Judges of the Court of our Lady the Queen before the Queen for setting aside with costs certain proceedings in an action then pending in the said last-mentioned Court, in which action the now defendant was the attorney of the then plaintiff, and the now plaintiff was the attorney of the then defendant; and before the time of the committing of the grievances by the now defendant as hereinafter mentioned, the said costs had been and were ascertained and taxed by one of the masters of the said Court; whereas before and at the time of the committing of the grievances by the now defendant as hereinafter mentioned, the plaintiff had been guilty of such sharp practice in the profession of an attorney as

and was and is considered to be and to import, disreputable practice, and practice discreditable to the attorney adopting or pursuing the same; whereof the now defendant then had notice: yet the now defendant, well knowing the premises, but contriving and falsely and maliciously intending to injure the now plaintiff in his good name, fame, and credit, and also in his said profession and business of an attorney-at-law, and to cause it to be suspected and believed that the now plaintiff had been guilty of such sharp practice as aforesaid in the said action, and that he the now plaintiff had been reprimanded by the said Master for such practice as aforesaid in the said action, &c., heretofore, to wit, on &c., wrongfully, maliciously, and injuriously composed and published a certain *ironical*, false, scandalous, malicious, and defamatory libel of and concerning the now plaintiff, and of and concerning him in the way of and in respect to his said profession and business of an attorney-at-law, and of and concerning the said action, and of and concerning the practice of the now plaintiff as such attorney with respect to the aforesaid orders, then wrongfully supposed by the now defendant to be such sharp practice as aforesaid, and of and concerning the said Master, containing therein the *ironical*, false, &c., matter following, of and concerning the now plaintiff, &c. &c., (that is to say), “ *An honest lawyer*, (thereby meaning the now plaintiff, and intending to represent that he was not an honest lawyer). A person of the name of Charles Boydell, (meaning the now plaintiff), an attorney in Devonshire Street, Queen Square, was severely reprimanded by one of the Masters of the Queen’s Bench (meaning the aforesaid Master) the other day, for what is called *sharp practice* in his profession,” (meaning and alluding to the now plaintiff’s practice with respect to the aforesaid orders in the said action, and that such practice had been and was sharp practice as aforesaid). By means of which, &c.

Exch. of Pleas,
1838.

BOYDELL

v.
JONES.

Exch. of Pleas,
1838.

BOYDELL

v.
JONES.

The defendant pleaded, first, Not guilty; secondly, a justification; thirdly, as to the composing and publishing the whole of the said libel in the declaration mentioned, excepting the words "an honest lawyer," that before the composing and publishing the said libel in the declaration mentioned, to wit, on &c., he the said plaintiff had been and was severely reprimanded by one of the masters of the Queen's Bench, for what is termed sharp practice in his the said plaintiff's profession, &c.—Verification.

Special demurrer, assigning for causes that the said plea is a mere partial repetition of the libel, and neither traverses nor confesses, and avoids the declaration; and that, as a justification, the plea is defective, in not justifying, except argumentatively, the imputation on the plaintiff of having been guilty of sharp practice in his profession; and that the instance or instances, and act or acts, of alleged sharp practice, should have been shewn in the plea; and that, even if one of the masters of the Queen's Bench had taken upon himself to reprimand the plaintiff, that would not have justified the defendant in publishing that fact to the world; and for that the plea does not justify the innuendo that the plaintiff had in fact been guilty of sharp practice; and for that the said libel is not divisible, and that the defendant should have justified the ironical words "an honest lawyer," in the sense imputed in the innuendo in that behalf; and that the plea is bad as amounting to the general issue, inasmuch as it gives a mere narrative, without vouching the truth of the fact of sharp practice; and that the said plea, to have been consistent, should have traversed the innuendo, &c.

Joinder in demurrer.

Channell, in support of the demurrer, was stopped by the Court, who called upon

Ogle, for the defendant.—He admitted that he could not support the plea, but proceeded to argue that the declaration was bad. [*Parke*, B.—The words charged in the declaration are clearly libellous. It alleges that the defendant called the plaintiff an honest lawyer, meaning that he was not an honest lawyer. The defendant must prove the truth of that, in order to justify himself. Then the declaration says that he charged the plaintiff with being guilty of sharp practice, which he avers meant disreputable practice. That is clearly a libellous imputation]. That prefatory averment only applies to the sharp practice. The declaration contains in fact two libels: one as to the term “honest lawyer;” the other as to his being guilty of sharp practice; but there is no prefatory averment as to what was meant by the term “honest lawyer,” without which the words cannot be taken in any other than their ordinary sense. [*Parke*, B.—How would you frame the declaration in that view of the case? It states that the defendant composed and published an *ironical* libel of the plaintiff, and that he called him “an honest lawyer,” thereby meaning that he was *not* an honest lawyer. Is not that enough?] There ought to have been an introductory averment, that by the term “honest lawyer,” is or may be understood that he was a dishonest lawyer. In *Goldstein v. Foss* (a), it was held that an innuendo, unconnected with any prefatory averment, cannot enlarge the sense of a libel. [*Parke*, B.—Is it not a sufficient prefatory averment, that the libel was *ironical*? In *Regina v. Dr. Brown* (b), *Holt*, C. J., says, that an information will lie for speaking *ironically*. The objection, however, now is as upon a general demurrer, and the Court cannot give judgment for the defendant, when there is any matter which is clearly libellous alleged in the declaration; and the charge that the plaintiff had been guilty of sharp practice is clearly so, and is properly sustained by a prefatory averment that sharp practice is considered disre-

Arch. of Pleas,
1838.

BOYDELL
v.
JONES.

(a) 2 Y. & J. 146.

(b) 11 Mod. 86.

rch. of Pleas,
1838.

BOYDELL
v.
JONES.

putable practice]. Suppose an action of *debt* were brought by the indorsee against the acceptor of a bill of exchange, and the declaration contained two counts, one upon the bill, which as between those parties would be clearly bad, and another count which was perfectly good, as for goods sold and delivered; and the defendant pleaded to the whole declaration a plea which could not be supported, and was specially demurred to; would not the defendant be at liberty to object that one of the counts was bad on general demurrer? [*Parke, B.*—No; it must be taken as if it were a general demurrer to the whole declaration; and then, one count being good, how can the Court give judgment for the defendant? The demurrer in such a case would be too large]. Then there is another objection. This is a libel alleged to be spoken of the plaintiff in his character of an attorney; but there is no allegation that he practised as such at the time of committing of the grievances. The averment is, that he was and still is an attorney; but consistently with that averment, he may have ceased to carry on practice. The declaration ought to have gone on to allege that he continued to practise as an attorney. It may be that he was once admitted an attorney, and only practised for one day.

PARKE, B.—Suppose he had ceased to practise as an attorney—this is not an action for words but for a libel. This is a libel on him as a man. Suppose he had retired from the profession, and taken his name off the roll, to write of him that whilst he was an attorney, he had been guilty of sharp practice, would be a libel upon him. With respect to the other point, I think it was a sufficient prefatory averment, that the libel was ironical. At all events, as this must be taken as upon general demurrer, it is too large.

The rest of the Court concurred.

Judgment for the plaintiff.

PARKE, B., afterwards said:—I may take this opportunity of mentioning, that in the report of the case of *Ferguson v. Mitchell* (a), in which this question, as to a demurrer being too large, came before the Court, there is an error as to what is stated to have fallen from me on that subject. What I intended to state was, that if there be a special demurrer to the whole declaration, and one of the counts or breaches is good, the consequence is, that, the demurrer being too large, the plaintiff must have judgment on the whole declaration; and if the bad count or breach is good after judgment, the plaintiff may recover upon it; if bad, he can cure it by entering a nolle prosequi, or having the damages separately assessed, and entering a remittitur damna: if he does not, the judgment may be arrested, or a writ of error brought.

Exch. of Pleas,
1838.

BOYDELL
v.
JONES.

(a) 2 C. M. & R. 692.

POPE and Others v. WRAY.

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial before *Alderson*, B., at the London sittings in this term, it appeared that the action was brought to recover back a sum of 24*l.*, alleged to have been paid by the plaintiffs to the defendant on a misrepresentation of facts, under the following circumstances. The defendant had supplied the plaintiffs with goods to the amount of 71*l.* 6*s.* The plaintiffs were in the habit of occasionally doing business and making payments through one Minshull, and authorized him to pay the defendant the 71*l.* 6*s.* Minshull paid the defendant 50*l.*,

The defendant supplied the plaintiff with goods to the amount of 71*l.*; the plaintiff authorized M. to pay the defendant that sum. M. paid the defendant 50*l.*, and applied the remaining 21*l.* to his own use. M. also owed the defendant 24*l.*; and the defendant drew on him a bill for

45*l.*, the amount of these two sums, which he accepted, but which was dishonoured when due, and M. subsequently became bankrupt. The defendant applied to the plaintiff for payment of the amount of the bill, representing that it had all been left unpaid on the plaintiff's account by M.; and the plaintiff, on such representation, paid the 45*l.*, and took possession of the bill. In an action to recover back the balance of 24*l.*, as having been paid under a misrepresentation of the facts: *Held*, that the plaintiff was not bound to prove that, before action brought, he tendered back the bill to the defendant.

Exch. of Pleas,
1838.

POPE

v.
WRAY.

and applied the balance of 21*l.* 6*s.* to his own use. Minshull had also had some transactions on his own account with the defendant, and had become indebted to him the sum of 24*l.* 9*s.* The defendant drew a bill on him for 45*l.* 15*s.*, the aggregate of these two sums, which was accepted. This bill became due in May 1837, when it was dishonoured; and Minshull subsequently absconded and was declared a bankrupt. The defendant thereupon made application to the plaintiffs for the whole amount as having been left unpaid on their account by Minshull, and the plaintiffs, upon that representation, paid the defendant the money, and received the bill. Having subsequently discovered the payment of the 50*l.* by Minshull to the defendant, the plaintiffs brought this action to recover back the balance of 24*l.* which was thus overpaid by them to the defendant.

It was contended for the defendant, that, before the plaintiffs could maintain this action, they were bound to have tendered back the bill to the defendant. The learned Judge reserved the point, and a verdict was found for the plaintiffs, damages 24*l.* 9*s.*

Kelly now moved, pursuant to the leave reserved, to enter a nonsuit. The plaintiffs ought to have proved a tender of the bill to the defendant before the commencement of the action. It was the sole security and the only evidence for the defendants, for the recovery of the debt due to them from Minshull. By this action the plaintiffs disaffirm the right of the defendant to retain the 24*l.*, and leave him the creditor of Minshull for that amount, without any evidence to support his claim against Minshull unless he has the means of producing the bill. The bill constitutes no security or evidence for the plaintiffs [*Alderson*, B.—Have they the less paid the money under misrepresentation of facts? It is that which raises the contract on which the action is founded. Lord *Abinger*, C. B.—

Could the defendant have recovered back the bill without paying the money? If not, it is clear he had no right to the bill until after payment of the money; and if so, the plaintiffs were not bound to tender it.] The two acts ought to be concurrent: the bill should be delivered up to the defendant, that he may have his remedy against the acceptor; the money should be paid to the plaintiffs, in order to entitle the defendant to demand the bill. There must on either side be a readiness to put the other party in the same situation as he originally was. [*Parke, B.*—The instant the money was paid under a misrepresentation of fact, the right of action accrued.] So would it to the buyer of a horse, on a fraudulent representation by the seller; yet he cannot recover back the price, without returning or tendering back the horse.

Exch. of Pleas,
1838.

POPE
v.
WRAY.

LORD ABINGER, C. B.—I do not see how the bill is connected with the transaction out of which the plaintiffs' right of action arises, in any other way than as it was a security to them until the money was repaid. I do not see, therefore, what right the defendant had to a tender of it. If it be improperly detained, he must bring trover for it.

PARKE, ALDERSON, and GURNEY, Bs., concurred.

Rule refused.

Exch. of Pleas,
1838.

SMITH and Others, Survivors of SAMUEL SMITH and
GEORGE SMITH, deceased, v. ELIZABETH WINTER.

A retired partner may give authority by parol to a continuing partner to indorse bills in the partnership name, after the dissolution of the partnership.

And where the retired partner stated that he left the assets and securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name:

—*Held*, that the jury were justified in finding that the continuing partner had authority to indorse promissory notes, so left in his hands, in the partnership name.

A. indorsed to S. & Co., as a security for advances made to him by them, certain promissory notes made by B.

While the notes

were running, A. stopped payment, and a deed was executed by him and several of his creditors and among them by S. & Co., whereby his affairs were placed in the hands of inspectors, and the creditors, parties to the deed, agreed on certain terms not to call for or compel payment of the debts due from him for the period of three years. After the execution of this deed by A. and S. & Co., and before the notes became due, B. signed a written consent to the creditors' signing the deed, and giving time to A., without prejudice to their claims on her, B.:—*Held*, that her liability on the notes to S. & Co. was thereby revived.

ASSUMPSIT by the indorsees against the maker of three promissory notes; the first and second for 2,000*l.* and 3,000*l.*, dated 30th of April, 1831, payable six months after date; the third for 2,000*l.*, dated 6th July, 1831 payable three months after date. There were also counts for money lent, money paid, money had and received, interest, and on an account stated. The defendant pleaded non assumpsit, and several special pleas, of which one only (the ninth) ultimately became material in the case. That plea alleged, that the defendant made the notes in the first three counts mentioned, at the request and for the accommodation of one John Innes, without any value or consideration for paying the amounts thereof, and that there never was any value for the indorsement in those counts mentioned, of all which the plaintiffs had notice at the time of the indorsement to them; and that, before and at the time of forbearance and giving day of payment as thereafter mentioned, the plaintiffs held the said notes as securities for the payment of money by the said J. Innes, as principal debtor to them, and that the defendant was then liable (if at all liable) to the plaintiffs upon the said notes only collaterally, and as a surety for the said J. Innes, and not otherwise, of which the plaintiffs, at the time of such forbearing and giving day of payment, had notice: and that after the said notes were indorsed to the plaintiffs, and before the same or any of them had become due and payable, and before the com-

Exch. of Pleas,
1838.

SMITH
v.
WINTER.

mencement of the suit, to wit, &c., the plaintiffs, without the knowledge, privity and consent, or authority of the defendant, forbore and gave day of payment to the said J. Innes for a long space of time, to wit, for a space of time which did not expire until twelve months and upwards after the said notes became due and payable, of a large sum of money, to wit, the sum of 17,000*l.*, then owing from the said J. Innes to them the plaintiffs, and as collateral security only, and not otherwise, for the payment of part thereof by the said J. Innes, they, the said plaintiffs then, to wit, &c., held the said notes.—Verification. To this plea the defendant replied, that the plaintiffs did not, without the knowledge, privity, consent, or authority of the defendant, forbear and give day of payment to the said John Innes, in manner and form, &c.

At the trial before Lord *Abinger*, C. B., at the London Sittings after Trinity Term, it appeared that the action was brought by the plaintiffs, who composed the firm of Smith, Payne, and Smiths, bankers in London, against the defendant, who was the widow and executrix of Mr. Nathaniel Winter, under the following circumstances. Mr. Winter, in his lifetime, and up to the month of May, 1830, carried on business in partnership with Mr. John Innes, as West India merchants, under the firm of Nathaniel Winter & Co. From the 1st of May, 1830, to the 16th of May, 1831, the business was carried on under the same firm, by Innes and a Mr. Robert Cumming Norman. On the latter day Innes and Norman dissolved partnership. On the 8th July, 1831, Innes applied to the plaintiffs, with whom he kept an account, to discount the note for 2,000*l.*, of the date of the 6th July, mentioned in the declaration, which they did. On the 22nd of July they made him a further advance of money on the deposit of the other two notes. All the notes were indorsed to them by Innes in the name of Nathaniel Winter & Co. Before any of them became due, Innes stopped

Exch. of Pleas,
1838.

SMITH

v.
WINTER.

payment; and on the 1st September, 1831, his affairs were placed in the hands of inspectors, and a deed of inspectorship between himself and divers of his creditors was executed on the same day. The parties to this deed, (which was given in evidence by the defendants), were Innes, of the first part; the creditors named in a schedule (amongst whom were the plaintiffs), of the second part; the said R. C. Norman, of the third part; and George Ward Norman, Martin Tucker Smith, and James Parkinson, of the fourth part: and thereby, after reciting (inter alia) that R. C. Norman had retired from the partnership, and that Innes, between him and Norman, was bound to pay all the debts of the co-partnership, it was agreed amongst the parties, that, notwithstanding the debts due from Innes to his creditors, it should be lawful for him (Innes) to continue to manage and carry on the business of a West India merchant, and to receive and sell the produce of his estates, and of such other estates and effects as might be consigned to him, and to make such disbursements as should be necessary; and that the several creditors, parties thereto, should not nor would call for or compel payment of the debts due from him, Innes, to them respectively, within the period of three years then next following. The deed then contained provisions for the keeping by Innes, of true accounts, and the inspection of them by the parties of the fourth part, and for the payment of the debts as money into the plaintiffs' bank, which was to be paid from time to time, came to his hands; and also the following clause:—"And it is hereby declared, that persons holding bills, bonds, notes, or other securities of the said John Innes, or any other person, shall not be prejudiced or affected in respect of their recourse against third parties, or against the property pledged, by reason of their concurring in this license and agreement." There was also a proviso that the deed should be void in so far as it restraining the creditors from suing for their de

case Innes should make default in any of the stipulations *Exch. of Pleas,* and agreements therein contained on his part, or if all his **creditors** in England should not sign the deed within three **months**, and his creditors abroad within eighteen months, **from its date**. It was further stipulated that the deed **should be pleadable in bar as a release by Norman**, but **there was no such stipulation as to Innes**. *1838.*

SMITH
v.
WINTER.

This deed was executed on the 12th September, 1831, at the plaintiff's banking house, by one of the plaintiffs, Samuel George Smith, in the following manner:—"For self and partners—Samuel George Smith." There was no evidence of any express assent to or dissent from this mode of signature by the other partners. On the 23rd of September, the defendant signed the following memorandum:—"I consent to the several creditors of Mr. John Innes, or Nathaniel Winter & Co., signing the deed of inspectorship already prepared, dated &c., and giving time to Mr. Innes, without prejudice to their claims on me, or on the estate of the late Nathaniel Winter, in respect of any debts to which I or Mr. Winter's estate may be liable.—Elizabeth Winter." Some of the creditors failed to execute the deed of inspectorship within the time required, and the plaintiffs, with other creditors, at Innes's request, signed a memorandum indorsed upon it, whereby they agreed to continue its operation notwithstanding. Before the signature of this memorandum by the plaintiffs, the defendant gave this further consent, dated the 8th of December 1831:—"As the deed above referred to contained a clause rendering it void if all the creditors in Great Britain did not sign within three months, and those resident abroad within eighteen months, which clause it has been found necessary to waive by a memorandum signed by the creditors and indorsed on the deed, I declare that the consent I have already given to the creditors signing the inspectorship deed, shall be

Exch. of Pleas,
1838.

SMITH
v.
WINTER.

considered applicable to the deed so altered.—Elizabeth Winter.”

It appeared that in August 1831, the plaintiffs had received from Innes the sum of 1,000*l.*, on account of ~~their~~ advances on the bills. When they became due, on the 9th October and 2nd November 1831 respectively, they were dishonoured; and the present action was brought to recover a balance of 4,500*l.* and interest due in respect of them. In order to prove that the indorsements were duly made by Innes in the name of the firm of Nathaniel Winter & Co., the plaintiffs called Norman as a witness, who stated that on the dissolution of the partnership, Innes was left to wind up the concern, and the whole assets and securities of the firm, including the three notes in question, were left in his hands; that he (Norman) had no objection to Innes's indorsing the names of Nathaniel Winter & Co. on the notes; that he saw the notes two or three times before the dissolution, but did not know when the indorsements were made; that, whatever was his liability, he did not wish to withdraw or alter it; but that he claimed no interest in the notes. On cross-examination, he said that he did not wish to alter his situation by any admission now made. It appeared also from his evidence, that the terms of the dissolution were stated in a letter written by Innes to, and signed by, him, the witness; and this letter being tendered in evidence by the plaintiffs, was in the first instance objected to and rejected for want of an agreement stamp; but having been sent to the stamp office and stamped, it was put in and read in reply, after the close of the defendant's case. By it Innes was authorized “to wind up the business, and was to be responsible for the engagements of the firm, and to take up the profits.”

It was contended for the defendants, that the ninth plea was proved by the production of the deed of inspectorship,

with the clause therein contained, whereby the plaintiffs and the other creditors agreed not to compel payment from Innes for three years. For the plaintiffs, it was insisted that the firm was not bound by the signature of one partner, no consent from the others being shewn; and they relied also on the proviso in the deed, that it was not to affect the holders of securities as to their recourse against third parties, and on the written consent of the defendant, as furnishing an answer to the objection. The defendant's counsel further contended, that it ought to have been proved that the indorsements by Innes were made during the continuance of the partnership, no sufficient authority to him from Norman, to use the partnership name after the dissolution, having been proved. The Lord Chief Baron left it to the jury, as to this point, to say whether the indorsements were or were not made before the dissolution; and if not, whether Innes had authority from Norman to indorse the notes: and stated his opinion to be, that it was not necessary for such a purpose to have a power of attorney, or an authority in writing, but it was sufficient if they thought that what Norman had stated involved an authority to indorse bills. His Lordship advised the jury to find that time was given by the plaintiffs, in the terms of the issue on the ninth plea, being disposed to think that the consent of the defendant would not operate to revive her liability, without a new consideration. The jury found, that there was no evidence that the notes were indorsed before the 16th of May, 1831; but that Innes had full authority from Norman to use the partnership name on notes or any other securities, for the liquidation of the concern. They found also that the plaintiffs did, without the privity, consent, or knowledge of the defendant, forbear and give time to Innes, but that the defendant subsequently gave her consent thereto, before any of the notes became due. The

Exch. of Pleas,
1838.

SMITH
WINTLER.

Exch. of Pleas,
1838.

SMITH
v.
WINTER.

verdict was therefore entered for the plaintiffs on the first issue, damages 6,191*l.* 5*s.* 10*d.*, and for the defendant on the ninth issue; leave being reserved to the plaintiffs to move to enter a verdict for them on that issue also, if the Court should be of opinion that, under the circumstances, the defendant was not discharged from her liability.

On a former day in this term, *Maule*, for the plaintiffs, accordingly obtained a rule to shew cause why the verdict should not be entered for the plaintiffs on the ninth issue, or why judgment should not be entered for them non obstante veredicto, on the ground that the plea shewed no consideration for the alleged agreement to give time.

Cresswell, for the defendant, also moved for a new trial, on the ground that there was no sufficient evidence of an authority given by Norman to Innes to indorse the notes in the style of the firm, after the dissolution of the partnership. He contended, first, that the agreement of dissolution clearly gave no authority to indorse bills in the partnership name: *Abel v. Sutton* (a): and as to the supposed parol authority given by Norman, that, in the first place, the evidence of it was not admissible, the terms of the dissolution having been reduced to writing; and secondly, that it did not necessarily amount to an authority to indorse bills in the partnership name, and so to impose a new liability on the retired partner, but only to do what he, Innes, thought fit for the purpose of winding up the concern, with the securities in his possession, as they then stood. But he argued, further, that even if Innes had authority from Norman, an indorsement in the style of the firm, after the dissolution of the partnership, could only represent the person *then* trading under that firm, *viz.*,

(a) 3 Esp. 108.

Innes himself, and therefore did not bind Norman; *Kilgour v. Finlyson* (a). *Exch. of Pleas,*
1838.

SMITH
v.
WINTER.

LORD ABINGER, C. B.—I cannot entertain any doubt on this part of the case. It is not necessary to give authority to the continuing partner to indorse bills in the partnership name, by deed or in writing; the retiring partner may do it by parol: and I think there was here sufficient evidence that he did give such authority. That is what he has himself proved: and if you look at the circumstances, it is hardly possible it could be otherwise; the notes having been obtained by the house, when in difficulties, for the express purpose of raising money to carry on the concern and meet its engagements; I think it was an authority to use the partnership name whenever it should be necessary, in order to raise money for the purposes of the partnership. Norman was perfectly competent to give such authority, and it was most natural that he should do so. The whole question is, whether I was not right in leaving it to the jury to say whether, independently of any inference from the written paper, the witness had not given such authority. There is a great difference between the cases where one person is left merely to wind up the concern, and where one partner retires, leaving the other to carry on the business. If the concern is completely put an end to, and nothing is left to be done but to get in the debts, &c., the one cannot pledge the credit or the name of the other: but this was the case of a continuing partnership.

PARKE, B.—I agree that there was evidence to go to the jury of an authority to Innes to indorse the name of the partnership after the dissolution. There is no doubt upon the law as stated by Mr. *Cresswell*, and if the evidence had been no more than that derived from the writ-

(a) 1 H. Bl. 155.

Exch. of Pleas,
1838.

SMITH
v.
WINTER.

ten agreement, I should have thought there was not sufficient proof of authority, so as to make Norman liable: the expression "to wind up the business" is very vague, and would only imply an authority to do what was strictly necessary to settle and liquidate the engagements of the concern. But there was evidence of a more extensive authority than that conveyed by the written paper—a general authority to Innes to do what he pleased with the existing securities of the firm. Now, the ordinary mode of using negotiable instruments, in order to give a title to them, is to indorse them. If this was otherwise, it might have been set right at once, by asking the witness whether Innes had any authority from him independent of the written instrument. I think, therefore, there is no ground for disturbing the verdict, there being evidence to go to the jury of a continuing authority given by Norman to Innes, independent of the written paper.

GURNEY, B., concurred.

Rule for a new trial refused.

On a subsequent day, cause was shewn against the plaintiffs' rule, by

Cresswell and Wallinger.—The first question is, whether time was in fact given by the plaintiffs to the defendant. It is admitted by the replication, that the notes were given by the defendant without consideration, and indorsed with notice of that fact, and that the plaintiffs held them as a collateral security for the debt of Innes. The plaintiffs admit, therefore, that the defendant stands merely in the situation of a surety for Innes's debt, and the case is to be taken as being in all respects one in which the effect of giving time arises as between principal and surety. Now, the allegation

in the plea is, not that the plaintiffs gave time *by deed*; the issue simply is, whether, in any way, they forbore and gave time of payment to Innes of the debt as a collateral security for which the notes were taken. [Lord *Abinger*, C. B.—There is no allegation that time was given *on the notes*.] If time be given to a debtor generally, it is given upon all the securities in the creditor's hands, on which his name appears. If time were given to a party who had executed a bond, to pay his *debt*, the creditor could not sue on the bond. It is said this deed was not executed so as to bind the plaintiffs' firm, and even if it was, that it contains no binding agreement to give time to Innes. Assuming, for the present, the deed to have been executed by all the plaintiffs, it would amount to a giving of time to Innes, not as being a release, or being pleadable in bar by him, but because it would be a breach of contract if they sued him in the mean time; and their hands being thus tied up as against the principal, the surety is thereby discharged. That is the principle established in *Rees v. Berrington* (a), and subsequent cases. There is no distinction in this respect between those agreements which only operate to give a right of cross action, and those which operate as an absolute release: if there be a binding undertaking to give time to the principal, the surety is discharged. How, then, would it have altered the case, if all the plaintiffs had executed the deed? If *one* of them is bound by his contract not to sue Innes during the three years, the effect is the same. But further, where parties have assented to and acted on a deed, they are bound by it although they may not have executed it; *Butler v. Rhodes* (b), *Jolly v. Wallis* (c), *Ball v. Dunsterville* (d). [Lord *Abinger*, C. B.—There was no proof of any distinct acts done under this deed.] It appeared that the parties left the management

Exch. of Pleas,
1838.

SMITH
WINTER.

(a) 2 Ves. jun., 540.

(b) 1 Esp. 236.

(c) 3 Esp. 228.

(d) 4 T. R. 313.

state to the inspectors, as the representatives; and the arrangement, at all events, continued for a considerable time. The plaintiffs taken the benefit of it; and there was abundance whence the jury might presume that they were parties to it. The general doctrine laid down in *Marrison v. Jackson* (a), that one partner cannot bind another by deed without his assent, need not there be disputed.

The next question is, whether the consent of the defendant obviates the effect of the deed. Now, the surety is discharged as soon as time is given to the principal, although the former may not then be liable for the debt; and the principal cannot, by any new engagement subsequently made, bind the surety anew without his assent. He, therefore, could not by any act of his, after the execution of the deed, alter the situation of his surety. Nor could the defendant herself afterwards make herself again liable, without a new consideration. [*Parke, B.*—That is the question. Lord *Eldon* lays it down, in *Mayhew v. Chichester* (b), that a subsequent consent is sufficient to revive the liability of the surety.] That decision probably proceeded on equitable considerations. [*Parke, B.*—The whole of this is an equitable doctrine, which has crept into the law.] If the indulgence given to the principal be a bar at any time to the claim against the surety, it would seem that it is a bar for ever: per *Bosanquet, J.*, in *Chichester v. Mayhew*: *Norman v. Moore* (d). [*Parke, B.*—There was no question in those cases as to consent subsequently given. The cases shew that the plaintiffs forbore to sue the defendant without the defendant's consent. That consent cured the effect of the subsequent consent cures

(a) 10 Q. B. 221.
(b) 10 Q. B. 221.

(c) 5 B. & C. 1 M. & S. 221.
(d) 10 Q. B. 221.

that should have been replied. [*Parke, B.*—Must we not reasonably construe your plea so as to make it a good plea, i. e. as alleging that time was given without the defendant's consent at any time? otherwise it is bad, according to the authority of Lord *Eldon*.] It is submitted that the consent by matter subsequent, without consideration, is not sufficient to revive the liability of the surety. It is not like a subsequent admission of liability on a negotiable instrument, whereby the party admits that notice has been in fact given, or that the circumstances were such as rendered it unnecessary: here, at the time of the consent, the defendant was absolutely discharged by the previous act of forbearance to her principal.

Exch. of Pleas,
1838.

SMITH
v.
WINTER.

Lastly, it said that the proviso in the deed, that persons holding securities of Innes shall not be prejudiced as to their recourse against third parties, prevents the discharge of the defendant from her liability on these notes. But that stipulation could only operate inter se; the parties could not, by their own declaration or agreement, keep alive the engagements of third parties. The only purpose of the proviso was to prevent any private reservation of benefit inter se. In *Nicholson v. Revill* (a), Lord *Denman, C. J.*, says,—“ We give our judgment on the principle laid down in *Cheetham v. Ward* (b), as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor, is a discharge of all.” [*Parke, B.*—That does not apply to the case of principal and surety, but of two joint debtors. Perhaps the best answer against the application of this proviso is, that it should have come by way of replication—that though the plaintiffs did give time, they gave it with certain reservations, which prevented the discharge from taking effect].

(a) 4 Ad. & E. 675; 6 Nev. & M. 192.

(b) 1 Bos. & P. 630.

Exch. of Pleas,
1838.

SMITH
v.
WINTER.

Maule and Bayley, in support of the rule, were stopped by the Court.

LORD ABINGER, C. B.—The Court are not called upon in this case to express an opinion how far the signature of one partner to the deed can bind the others, and so can have the effect of discharging a surety for the debtor. On that point I give no opinion. The questions in the case are, first, whether the plea is proved by the evidence; secondly, whether, if proved, it is a good plea. Now, I cannot construe it so as to make it a good plea, without interpreting it to mean that the plaintiffs gave time to Innes, without the defendant's consent at any time before the notes became due: because we must take the law to be, according to the case of *Mayhew v. Crickell*, that if the defendant, at any time before the bills became due, gave her consent to the forbearance, she remains liable. The allegation in the plea must be taken to cover the same space of time as is before alleged, viz., before the notes became due; otherwise the plea is bad. Now, the defendant did give her consent before the notes were due: the plea, therefore, was not proved, and the verdict ought to be entered on that issue for the plaintiffs.

PARKE, B.—I also think that this plea was not proved, and that the verdict must be entered for the plaintiffs. I forbear to give any opinion on the question as to the signature to the deed by one of the partners only: and I should be sorry to have to dispose of the case on that ground, since the objection might, perhaps, have been obviated at nisi prius by amending the plea. But I think the plea was not proved in substance. We ought so to construe it as to make it a good plea if possible, and must therefore read it as alleging that the plaintiffs fo

ones, without such
her still liable;
the notes became
was proof that, after
ore the notes became
which, according to the
in *Mayhew v. Crickett*, is
city. He there says,—“ I
a creditor takes out execution
or, and waives it, he discharges
ous principle which prevails both
and courts of equity. On the other
city afterwards makes a promise to pay,
et to that as a promise without consider-
promise is valid, not as the constitution of a
the revival of an old debt. So, where a bank-
discharged by his certificate, he cannot, for that
on, impeach a subsequent promise to pay a former
at, as a promise without consideration.” The consent
of the defendant in this case was equivalent to a consent
that these promissory notes, to which she was a party,
should be deposited with the plaintiffs, as a security for
their debt, notwithstanding the deed. Her liability as
surety was thereby revived. The plea, therefore, was
not proved in substance, and on that ground the rule must
be absolute to enter a verdict for the plaintiffs.

Each. of Pleas,
1838.

SMITH
v.
WINTER.

GURNEY, B., concurred.

Rule absolute accordingly.

Exch. of Pleas,
1838.

HUGHES v. REES.

The writ of venditioni exponas is a branch of the writ of fieri facias, not a distinct process; and therefore a Judge has power in vacation, under the 2 Will. 4, c. 39, s. 15, to order the sheriff to return such writ, and an attachment may be obtained for disobedience to such order, pursuant to the rule of M. T. 3 Will. 4, s. 13.

IN this case (a), a fieri facias having been issued, and the sheriff of Carnarvonshire having returned thereto that he had seized goods of the defendant, but that they remained in his hands for want of buyers, the plaintiff, in vacation, sued out a venditioni exponas, and a judge's order for its return having been obtained, and no return having been made, the order was made a rule of Court, and *R. V. Richards*, on a former day in this term, obtained a rule nisi for an attachment against the sheriff, pursuant to the rule of M. T. 3 Will. 4, s. 13.

Jervis shewed cause, and contended that the writ of venditioni exponas did not come within the meaning of the above rule. The rule directs, "that, in case a judge shall have made an order, in the vacation, for the return of any writ issued by authority of the said act, (that is, the Uniformity of Process Act, 2 Will. 4, c. 29, s. 15), or any writ of ca. sa., fi. fa., or elegit, on any day in the vacation," the order, on disobedience to it, being made a rule of Court, an attachment shall issue. The writ of venditioni exponas, therefore, is not specially mentioned in the rule; and the object of the rule being that the plaintiff may be at once informed, by the return of the writ in vacation, what has been done, and that his security is perfected, that object is attained by the execution and return of the fi. fa. Nor is the venditioni exponas mentioned in the statute, unless it be considered as part the fi. fa. but it is rather a process consequential to and founded upon it.

Richards, contra.—This case is within the operation of the rule, the venditioni exponas being only a branch

(a) See the argument on motion in arrest of judgment, ante, 204.

the writ of fieri facias. Where, after seizure under a fi. fa., but before sale, the record was removed by error and a supersedeas awarded, a seizure being returned, it was held that a venditioni exponas might be awarded on the return of the fi. fa. which was filed : *Charter v. Peeter* (a), *Milton v. Eldrington* (b). If the venditioni exponas were a separate writ of execution, it would have been stayed by the writ of error : it issued, not on the judgment, which had been removed, but on the fi. fa.

Exch. of Pleas,
1838.

HUGHES
v.
REES.

LORD ABINGER, C. B.—I think Mr. *Richards* is right in his construction, and that the venditioni exponas is not a process distinct from the fi. fa., but a part of it; it is a writ directing the sheriff to execute the fi. fa. in a particular manner. If it were held otherwise, the sheriff might always defeat the object of the statute, by retaining the goods in his hands, as for want of buyers, until the first day of the term.

PARKE, B.—I think the venditioni exponas may be considered a species of fieri facias.

ALDERSON, B.—I am of the same opinion. It is of great importance to make sheriffs regular in their proceedings, otherwise the whole process of the Court will be avoided in vacation.

GURNEY, B., concurred.

On other grounds, however, the rule was discharged on payment of the costs of the order to return the writ, and of this application.

(a) Cro. Eliz. 597.

(b) 3 Dyer, 99, a.

Exch. of Pleas.
1838.

ANDERSON v. FULLER.

Where an arbitrator, to whom a cause was referred by order of nisi prius, directed that the verdict should be entered for the plaintiff for 254*l.*; and then set forth certain facts raising a question for the opinion of the Court, and awarded that if, upon such facts, the Court should be of opinion that the verdict should be for 125*l.* only, then the damages should be reduced to that sum:—*Held*, that a motion to enter the verdict for the latter sum, upon the facts so stated by the arbitrator, was in effect a motion to set aside the award, and must be made within the term next following that in which the award was made.

THIS was an action of assumpsit for work and labour, and expenses incurred by the plaintiff as an attorney, in executing the trusts of a deed under which the defendant and other parties were trustees. The defendant pleaded, first, non assumpsit; secondly, that the plaintiff and defendant were partners; thirdly, payment; fourthly, the statute of limitations. At the Herefordshire Spring Assizes, a general verdict was taken for the plaintiff for 1,000*l.*, the damages in the declaration, the cause and all matters in difference between the parties being referred, by order of nisi prius, to a barrister. The arbitrator made his award on the 8th of May last, and thereby directed that the verdict should stand for the plaintiff on all the issues, but that the damages should be reduced to the sum of 254*l.* 10*s.* The award then, after reciting that the arbitrator had been requested by the parties to state the facts, proceeded to set forth the circumstances of the case, whereby a question was raised whether the defendant was liable for certain acts of his co-trustees; and concluded by directing, that if, under the circumstances above stated, the defendant was liable in law to those parts only of the plaintiff's demand which were directed by himself, the damages should be reduced to 125*l.* 17*s.*; if he was not liable in law for any part, then that the verdict should be entered for the defendant.

In Trinity Term, a rule nisi was obtained to set aside the award, on the ground that it was not sufficiently certain or final; which was enlarged until this term, and was discharged on the 5th of November. On the 10th of November the plaintiff signed judgment, but no execution had yet issued.

On the 13th, *Petersdorff* obtained a rule to shew cause why the verdict should not be entered for the defendant.

on the first and fourth issues, and for the plaintiff with nominal damages only on the others; or why the damages should not be reduced to the sum of 125*l.* 17*s.* upon the facts stated by the arbitrator on the face of his award.

Exch. of Pleas,
1838.

ANDERSON
v.
FULLER.

Talfourd, Serjt., and *R. V. Richards* shewed cause, and contended that this application was too late, for that the effect of it was to have the express finding of the arbitrator set aside, and the motion ought therefore to have been made within the second term inclusive after the publication of the award.—The Court thereupon called on

Kelly and *Petersdorff* to support the rule.—This is not an application to set aside the award, but to give effect to that part of it which awards to the plaintiff the smaller amount of damages, in case the Court shall hold him entitled only to that amount, on the facts stated by the arbitrator. The award must be taken altogether. [*Parke*, B.—If no motion at all were made, the verdict would stand for the plaintiff, under the award, with 254*l.* 10*s.* damages. You do, therefore, seek to set aside the express award of the arbitrator. If it be an ambulatory award, so that nothing can be done upon it without the direction of the Court, then you must move to set it aside in due time. *Alderson*, B.—This is in effect a motion to set aside the judgment of the arbitrator on the facts. The question is the same as if the other motion had not been made; then should you be in time? Lord *Abinger*, C. B.—You might have included both terms in one rule; either to set aside the award, or to enter the verdict according to the opinion of the Court on the facts found.] Taken altogether, the award amounts to this:—I find for the plaintiff, damages 254*l.*; but I also find certain facts, and if upon them the Court shall think the

Exch. of Pleas,
1838.

ANDERSON
v.
FULLER.

verdict should be for 125*l.* 17*s.*, then I find for the plaintiff with that amount of damages only. The verdict for one sum in one event, for another sum in another event. The defendant is in time to determine either event, until the parties have been put in a different position. On the form of this award, the plaintiff had no more right to enter up judgment for the larger sum, than the defendant had to have it entered for the smaller sum. [*Alderson, B.*—The award would be bad if it were such as you state, as not being final; because an arbitrator cannot, without special leave, state a case for the opinion of the Court without coming to any decision himself.]

Lord ABINGER, C. B.—We are all of opinion that this is an express award of the larger amount, and that in effect this is an application to set it aside, which, therefore, ought to have been made within the time fixed by the invariable practice of the Court, namely, within the second term after the making of the award.

PARKE, ALDERSON, and GURNEY, Bs., concurred.

Rule discharged.

THICKNESSE v. THE LANCASTER CANAL COMPANY.

A company
were empowered
by an act of
Parliament to

make a canal within certain limits, without specifying any time within which it was to be completed: *Held*, that no limitation as to time could be assigned to the powers conferred, by an intendment that they were to be exercised within a *reasonable time*, and consequently that the works might be resumed at any period.

Quære, whether any and what acts would amount to an abandonment of the powers so conferred? If the capital, which the act empowers the Company to raise, be not raised to the full extent, *quære*, whether that circumstance affects the right of the Company to prosecute the work afterwards?

The act of Parliament gave certain commissioners power to purchase lands, &c., and directed them to make compensation to persons interested therein for all damage sustained:—*Held*, that a party entitled to an easement over lands so purchased by them, could not maintain trespass for acts done upon those lands to the prejudice of his easement, but as soon as any damage was actually sustained, he ought to have claimed compensation under the act.

when a verdict was found for the defendant for damages in the declaration, subject to the following

Exch. of Pleas,
1838.

THICKNESSE

v.
THE
LANCASTER
CANAL CO.

first count of the declaration stated, that the plaintiff possessed of a coal-mine under certain lands in the county of Lancaster, with liberty for him, his servants, and others, during the residue of a lease still in being, to enter upon the said lands with carts, horses, materials, implements, and to erect any buildings, machines, &c., and to dig any drains, &c.; to make and use any waggon-ways, roads, and other ways, and to do any other acts on the said lands necessary or convenient for working the said mine or for selling or carrying away the same by such means as he might think fit; and to lay up the same for other uses, on any part of the lands; and that by and in exercise of the privileges, &c., the plaintiff did and used certain railways and other ways on the said lands, for the purpose of working the mine, and of conveying and disposing of the same and its produce: yet the defendant placed and threw large quantities of stones, rubbish, &c., on those lands, and made emplacements, and also canals and excavations in and across the same, and continued them hitherto, and thereby at that time obstructed the plaintiff in the working of the mine and the enjoyment of the said privileges, and did and destroyed the said railways and other ways, and prevented him from carrying away and selling and disposing of the said mine and its produce, and partly from carrying it towards or unto certain navigable canals, viz. the Lancaster Canal and the Leeds and Thames Canal.

second count was similar, with respect to another mine held under similar privileges.

third count stated that certain lands were in the possession of John Atherton, as tenant to the plaintiff, and that the defendants placed large quantities of soil,

Exch. of Pleas,
1838.

THICKNESSE

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THE
LANCASTER
CANAL CO.

earth, rubbish, &c., thereon, and made embankments, and also canals and excavations, on and across the same, and continued them hitherto, by means whereof the plaintiff's reversion was injured, &c. Plea, not guilty.

By an act passed in the 32nd Geo. 3, (c. 101), entitled An Act for making and maintaining a Navigable Canal from Kirby Kendal, in the county of Westmoreland, to West Houghton, in the county palatine of Lancaster, and certain branches, a company was incorporated for that purpose, by the name of "The Company of Proprietors of the Lancaster Canal Navigation," and were empowered to make the said canal and branches along a line specified, and all such reservoirs and feeders as should be necessary; and for the purposes aforesaid, (amongst others in the act mentioned), the said Company, their deputies, agents, and workmen, were authorized to enter into and upon the lands and grounds of any person, &c.; and to survey, &c. and to set out and ascertain such parts thereof as they should think necessary for making the said canal, &c., and all such other works, matters, and conveniences as they should think proper; and also to bore, dig, and trench, get, remove, take, and carry away and lay earth, clay, stone, soil, rubbish, trees, roots of trees, &c., and any other matters or things which might be dug or got in making the said canal, &c., (with other incidental powers), they the said Company doing as little damage as possible, and making satisfaction in said manner by the said act mentioned, *to the owners or proprietors of or persons interested in the lands, tenements, or hereditaments, &c.* which should be taken and removed, diverted, or prejudiced, *for all damages by them sustained*; and it was further provided, that the said act should be sufficient to indemnify the Company for acts done by virtue thereof.

By section 30 it was enacted, that after any such parts of the said lands or grounds should be set out and ascertained for making the said canal and other works, it

should be lawful for all persons whatsoever, who should *be seised, possessed, or interested of or in any lands or grounds which should be so set out and ascertained*, or any part thereof, to contract for, sell, and convey unto the Company, all or any part of such lands or grounds which should from time to time be so set out and ascertained.

Exch. of Pleas,
1838.

THICKNLSSE

v.
THE
LANCASTER
CANAL CO.

By section 32, after reciting that differences might rise between the Company and the several owners of and persons interested in any lands, grounds, tenements, hereditaments, &c., which should or might be affected or prejudiced by the execution of any of the powers of the said act, touching the purchase-money to be paid, or recompence to be made to them respectively, it was enacted that all persons qualified in the manner by the said act provided, should be commissioners for settling all questions and differences which should arise between the Company and the several proprietors of and persons interested in any lands, grounds, tenements, hereditaments, mills, fisheries, or waters, that should or would be affected or prejudiced by the execution of any of the powers hereby granted, and that they, or any five of them, by writing under their hands, with consent of parties, might determine what sums should be paid by the Company for the absolute purchase of the lands, grounds, or hereditaments which should be set out and ascertained for making the said canal, &c., or others the purposes of the said act; and also adjust and determine what other distinct sum or sums should be paid by the Company as recompence for any damages which might be sustained by persons being owners of or interested in any mills, &c., lands, grounds, tenements, or hereditaments, by reason of severance; or in case such price could not be so settled, then the said commissioners were empowered to issue a warrant to the sheriff, commanding him to empanel a jury,

appear on a day not being less than nine, nor more than twenty-one days after warrant served, who should

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

inquire of and assess the sum to be paid for the purchase of such lands and grounds, or the recompence to be made for the damages that might or should be sustained; and the jury were to take into consideration the damage or inconvenience which might arise by means of any bridges, roads, or other communications, and assess separate damages for the same: and the commissioners should give judgment for such purchase-money or recompence.

By section 50, it was enacted that upon payment or legal tender of the money agreed upon, or determined upon by the said commissioners, or assessed by such juries as aforesaid, for the purchase of any such lands, grounds, or hereditaments as aforesaid, to the proprietors thereof, or other persons entitled to receive such money, then it should be lawful for the Company immediately to enter upon such lands, &c., and to dig, &c., and remove earth, &c., for making, &c. the said canal.

Section 53 enacted, that the commissioners might and should settle what shares and proportions of the purchase-moneys or recompence for damages which should be so agreed upon, determined, or assessed, should be allowed to any tenant or other person having a particular estate, term, or interest in the premises, for his or her respective interest therein.

Sections 55 & 56 reserved to proprietors of mines under the canal their right to work them, and provided a remedy in case of damage to the canal by working too near it.

Section 128 provided, that in any action against the Company for acts done in pursuance of the act, the defendant or defendants might plead the general issue, and give the act and special matter in evidence; and if it should appear to be so done, the jury should find for the defendant.

By statute 59 Geo. 3, c. 113, reciting that great progress had been made towards the completion of the canal, but that the money authorised to be raised had been found inadequate to the purposes of the act, the Company

were empowered to raise a further sum for the completion of certain new works thereby authorized, and certain other powers, limited in their duration to two years from the time of passing that act, were also conferred.

The plaintiff has been for some time working an extensive colliery at Kirkless, at Aspul, in the county of Lancaster, lying under the lands delineated in a certain plan (which formed part of the case). The coal under a portion of the lands, he holds under a lease from Mr. Wood, dated 3rd of May, 1824, for forty years: that under another portion, under a lease from Sir Robert Holt Leigh, dated the 1st February, 1834, for eleven years. He has also held other lands for twenty years as tenant from year to year to Sir Robert Holt Leigh, at a rent of 80%, and has let the same to his coal agent, John Atherton, for many years, as tenant from year to year, at a rent of 60%, who was in possession at the time of the supposed causes of action.

The coals under another portion of the lands marked on the map, which, as well as the others, the plaintiff has worked for several years, he holds under a lease from Mr. Hodgson.

The Lancaster Canal Company made their canal as far southward as a place called Bark Hill, about 1816. In that year an extension of it was made to a point in Kirkless, which is about four miles short of the place of West Houghton, to which they were originally authorized to extend it. The land taken by the Company for the purpose of that extension was contracted and agreed for between the Company and the owners of the lands through which that extended part passed, and was taken by the Company under such contracts.

In 1816 a junction was made at that point, between the Lancaster Canal and another public navigable canal called the Liverpool Canal. There was a formal opening on the occasion of that junction, on the 22nd October, 1816, a procession along the canals, several bands of music, and a great assemblage of people. Since that time the two

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

canals have been open to the public; boats have traversed them, and tolls have been paid. From that time nothing was done by the Canal Company to the south of the point above mentioned, with the exception after mentioned which produced the present action. The original line of the canal has been in progress for the last six or seven years. When the canal had been made to the above point, a wall was built across the end of the canal there. Lord Balcarras made a pier also upon the wall at the same point, for the purpose of loading coal on the canal there, and the plaintiff made another adjoining that of Lord Balcarras, and also a basin at the side of the canal at the same place, adjoining the pier, for the same purpose. This wall and the piers extended across the whole breadth of the canal. The plaintiff also, under the powers in his leases, made a railway connecting his pier with one of the basins of the Leeds and Liverpool Canal, for the purposes of his colliery. He also, under the powers in his leases, made a wharf or laying ground for the purpose of depositing his coals there. He also otherwise expended a large sum upon the colliery.

In April 1835, the workmen of the Company began to make the further cut in question, to the south of this point. This was done under certain agreements with Sir R. H. Leigh and the devisees of Hodgson, and with their knowledge and consent. They pared away the turf along the whole line of their intended extension; and the turf of that part of the land along the extended line which was included in the agreement hereinafter mentioned with Sir R. H. Leigh, was taken away by Sir R. H. Leigh. They excavated the ground on both sides of the plaintiff's railway, but left that standing *until the 9th of February, 1836, when they removed it* and the ground on which it stood, and let in the water from the canal. In making this extension they cut through the wall and piers. This extension is about 200 yards long, and terminates in a field occupied by Atherton under the plaintiff.

On the 29th of April, 1834, an agent of the Canal

Company pointed out to Mr. Wood the land which was afterwards taken from him by the Canal Company, for the extension of their canal. On or about the 2nd of July, 1834, all the lands which were required by the Company for such extension, were set out. These lands were within the parliamentary line, and were necessary for the extension of the canal. On the 9th of September, 1834, the Canal Company received a notice from Mr. Wood not to trespass upon his lands, which intimated his dissent to the Company taking the same for the extension of their canal. On the 10th of September, Mr. Wood's land, which had been before set out, was staked out; and on the same day, a tender of a sum of money was made to him by the company, for the value of the said land and damages, which was refused by Wood, who admitted the value to be sufficient, but stated that he had promised his coal tenant, Mr. Thicknesse, to oppose the extension of the canal. Mr. Wood's tenant of this land was then applied to on the same day on the part of the Company, but she refused to treat with them for the sale of her interest in the land. On the 19th of September, 1834, the Company received a notice from the solicitors of the plaintiff, stating that the plaintiff was the lessee of certain coal mines under certain lands, which were the same as those set out, through which the Lancaster Canal Company had manifested an intention of cutting a canal, and that he altogether disputed their right to cut such canal, and that, as the same would interfere prejudicially with his works and powers under his coal leases, he should resort to legal means for his protection. Besides the land belonging to Mr. Wood, and before mentioned, the land taken by the Company for the extension of their canal comprised certain land belonging to Sir R. H. Leigh, and certain other land belonging to Mr. Hodgson's devisees. These lands of Sir R. H. Leigh, and the devisees of Mr. Hodgson, were taken by the Company under agreements with them respectively, and with their

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

respective consents; and these agreements were pursuant to the provisions of the statute 32 Geo. 3, c. 101, and were duly enrolled; and were agreements for the value of the absolute interest in the lands.

The land purchased of Sir R. H. Leigh, under agreement before referred to with him, was part of the land demised by him to the plaintiff, and by the plaintiff demised to John Atherton, as before mentioned.

On the 27th of September, 1834, five commissioners, duly qualified and appointed, gave due notice, in pursuance of a requisition to them on behalf of the said Company, of a general meeting of the said commissioners, at Lancaster, on the 13th day of October, for the purpose of determining and adjusting what sum or sums of money should be paid by the said Company to the said James Wood and his tenant Catherine Bretherton, for the absolute purchase of the lands before referred to, of which the said James Wood was owner, and Catherine Bretherton his tenant thereof, and also what other distinct sum should be paid to them or either of them in recompence for any damages which might be sustained by either by reason of severance of the lands; and that in case of their refusal to submit the said matters to the determination of the commissioners, they should issue their warrant to summon a jury, pursuant to the act, to assess the value of the said lands, and the amount of the said recompense. The commissioners met pursuant to such notice at the time and place specified in the notice, and proof being made to them of a refusal on the part of Mr. Wood and Mrs. Bretherton to submit the matter to their decision, they on the same day signed a warrant to the sheriff of Lancaster to impanel a jury to appear before them at Yarrow Bridge, at a certain place there within one mile of the canal, on the 24th of October; and notice of this intended meeting on the 24th was given to Mr. Wood, by a letter addressed and sent by the post to his attorney, on the 14th of October. On the said 24th

any of October, the said commissioners and the jury which had been summoned and returned, met at the time and place named in the said warrant. Mr. Wood appeared by his attorney, under a written protest, which, amongst many others, recapitulated his previous objections to the want of power in the Company under their act to extend their canal, and insisted that the warrant ought to have made mention of Mr. Thicknesse, and have summoned the jury to assess damages for his interest in the lands.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

The jury awarded by their verdict 80*l.* to Wood for the value of the land, and 5*l.* to the tenant for her interest in the same, and 20*l.* to Wood for the damage occasioned by severance, and an inquisition was regularly drawn up and signed, and judgment given by the commissioners for the same. On the 4th of November, these sums were tendered to Wood and Bretherton respectively, and refused by them, and on the 9th of December, were paid into the Bank of England, in the name and with the privity of the Accountant-General, to the credit of Wood and Bretherton respectively. On the 19th of December, in the same year, the Company entered on the said lands belonging to Wood. The action was commenced on the 7th of July, 1836.

The plaintiff had no estate in the surface of the lands taken by the Company for the purpose of the said extension from Wood, or from the devisees of Hodgson.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover on all, or any, or which of the counts of the declaration, and in that case it was agreed that the amount of the damages should be referred. If the Court should be of opinion that the plaintiff was not entitled to recover, or that his action was commenced too late, then a nonsuit to be entered, or a verdict for the defendant.

Sir *W. Follett*, for the plaintiff.—The plaintiff's claim to recover in this action rests upon distinct grounds, as it is

Exch. of Pleas,
1838.

THICKNESSE

v.
THE
LANCASTER
CANAL CO.

applied to the first and second counts, and as it is applicable to the last count, of the declaration. In the last count he complains of a damage done to his reversionary estate in the surface of the land in lease to his tenant, Atherton; in the other counts, of damage done to easements which he enjoys under different coal leases over the lands which were taken by the Company for the extension of their canal. The first and most important point for the decision of the Court applies equally to both classes, which is this;—whether a Court of law will limit within any bounds of time the exercise of powers under acts of this description, or whether they may be pursued at any period, however remote from the time when the acts passed, or even the exercise of them resumed after the intention to abandon the undertaking has once been fully made apparent by the acts of those authorized to complete it. There is no decision of any court of law upon this point, but it is contended on the part of the plaintiff, that such powers must be carried into execution within a reasonable time; and that this is an implied condition annexed to such acts. This is not the case of a public act, that is, public by reason of the matters to which it relates, which cannot lose its force merely by desuetude, but has the force of law until repealed; but it is an act private in its nature, made public merely for facility of proof, or that the courts may notice it without being pleaded. Such acts are viewed merely as private agreements sanctioned by the legislature;—compacts entered into by individuals with the public, possibly attended with advantage to the public, but having for their object the private advantage of the undertakers. Such compacts must be performed in omnibus. *Blakemore v. The Glamorganshire Canal Company* (a). If, therefore, it be a condition annexed to such acts that the powers conferred by them should be exercised within a reasonable time, that condition has not been performed here; for nearly fifty years have elapsed since the pass-

(a) 1 Mylne & K. 165.

ing of the first act under which this Company was formed; and from the case it appears that nothing had been done to the southward of a place termed Bark Hill, since 1816, a period of eighteen years; and such a long disuse, unexplained, must certainly be taken to be unreasonable. [He also referred to the standing order of the House of Lords, which requires the introduction of a limitation of time in all acts of this kind]. But even if no such implied condition exist, in cases where the act itself prescribes no limit within which its powers are to be executed, still if the intention to abandon or not to prosecute further an undertaking partially executed, be finally declared, such undertaking cannot be further pursued, for otherwise a company might be enabled to practise the grossest frauds, and to do most serious mischief to others who may have embarked in other undertakings, upon the well-grounded expectation that the disused undertaking would not be renewed. [He then referred to the map, and to the facts stated in the case as to the making of the wall, the piers, the basin, and laying grounds, at the termination of the canal at Bark Hill, in 1816, for the purpose of shewing that these acts were done on the supposition that the canal would not be proceeded with further southwards, and that the Company had encouraged such a notion by their acts; and that, in fact, at that time they had abandoned all intention of proceeding further in that direction with their canal, which was to be inferred from the facts of the case, especially from their junction with the Leeds and Liverpool Canal]. But still, if the Court should think that no intention of abandoning the undertaking appears, it may be collected from the statutes themselves that the undertaking cannot be completed under the powers of the acts; for, by the stat. 59 Geo. 3, c. 113, it appears that the money then authorized to be raised was inadequate for the completion of the undertaking; the additional sum which the Company were entitled to raise under that act was to be applied to the works alone, which they

Exch. of Pleas,
1838.

THICKNESSE

v.
THE
LANCASTER
CANAL CO.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

were empowered by that act to make, and those additional works were to be completed within two years from the time of passing that act. It is, therefore, plain that they are without funds for the completion of the whole undertaking, and it follows that they have no longer any right to take lands for its partial execution. *The Mayor of King's Lynn v. Pemberton*, (a); *Agar v. The Regent's Canal Company* (b). It may be said that the 4 Will. 4, (The Wigan Railway Act), recognises the power in the Lancaster Canal Company of continuing their canal as subsisting. But a recital of that kind in an act of a private nature is not to be extended to affect the interests of other parties not included within its provisions. *Brett v. Beales* (c).

But 2ndly, the Company have not pursued the provisions of their acts. They ought to have included Mr. Thicknesse's interests in the lands, and have had them submitted to the jury who awarded to Wood and his tenant the value of their interests in the land. It may be said that the plaintiff had no estate or interest in those lands, but only easements to be exercised on or over them. But it would be too narrow a construction so to limit the term "interest." Rights of this kind may be and commonly are of far greater value than the land itself. A way-leave often lets for a far greater rent than the land over which it goes would let for. [*Parke, B.*—The Company purchase only that which they are to use, viz. the land; the easements they do not want; if those are interfered with or damaged by the canal, that is matter of compensation for damage when the injury arises.] That course would be attended with great inconvenience and risk, and the party whose valuable rights are certain to be interfered with, though the precise time when may be uncertain, would

(a) 1 Swanst. 244

(b) *Ib.*, in notis. See the present Lord Chancellor's observations on the case of *Agar v. The*

Regent's Canal Company, in *Salmon v. Randall*, 3 Mylne & Craig, 444.

(c) Moo. & Malk. 421.

ave to trust to his chance of being indemnified by a Company which might prove insolvent. As to the supposed uncertainty whether any damage will result, that argument would equally apply to damage by severance, yet compensation for that is given under the act when the lands are taken.

Erech. of Pleas,
1838.

THICKNESSE
OF
THE
LANCASTER
CANAL CO.

Next, as to the land in lease to Atherton: in the surface of that the plaintiff had an estate. He was the reversioner, having leased to Atherton from year to year, and reserved the rent to himself. There was, therefore, a tenancy between them, and he had a reversion in the lands; *Poultney v. Holmes* (a), *Curtis v. Wheeler* (b), *Pike v. Eyre* (c); and for this interest in the land he has received nothing. The Company have taken the land without giving him the value of his interest in it, nor have they taken into account the interest of his tenant Atherton. Atherton might have maintained trespass against them, and the plaintiff is entitled to sue them in this form of action as reversioner.

Lastly, the proceedings before the commissioners and the jury were irregular, for the requisite notice of that meeting had not been given; fourteen days' notice of all meetings of the commissioners is required by a subsequent statute, and this provision repeals that contained in the 32 Geo. 3, relative to the summoning of the jury, and applies equally to the meetings of the commissioners and a jury, as to those where the commissioners act *proprio vigore*.

Cresswell, contra.—No authority has been cited, of any Court either of law or equity, for the position that a limitation of time is to be placed by the construction of the Court on the exercise of powers under acts of this description, where none is imposed by the acts themselves. What is to be the limit? No positive and unvarying rule can exist; for

(a) 1 Stra. 405.

(b) Moo. & M. 493.

(c) 9 B. & Cr. 909.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

it is obvious, from the very nature of the thing, that none such could be applied. What can be more uncertain than a *reasonable time*, as applied to such a subject? How is it to be computed; with reference to what circumstances; and by whom? Is it to be a question of fact merely in each particular case, or is it to be a mixed question of fact and law, whether a reasonable time has elapsed? The standing order of the House of Lords, which has been referred to, rather makes against than in favour of the argument which it is adduced to support; for, had there been this implied condition which is contended for, that order would have been unnecessary, since the works would have been proceeded with, in most instances, without delay, from a fear in the undertakers of incurring the danger of a cesser of their powers. Admitting the existence of a compact between the public and such undertakers, it is not necessarily part of such compact that there shall be an immediate or simultaneous execution of all the powers of the contract; and a temporary suspension of them may promote, rather than impede, the advantage to be derived from the undertaking, and may be best calculated to give the public that which is supposed to have been bargained for on its behalf. Suppose fresh mines are opened, or manufactures introduced near to a part of the line which is unexecuted, and a corresponding increase of population and traffic ensues, these circumstances may well cause and justify the extension of an undertaking, which might before have been completed as far as the public benefit required. Neither will the supposed mischief ensue from the want of a limitation, for the lands themselves cannot be taken without a full compensation, and this would include injuries to other rights of the same parties, which might be affected by the taking of the land for the continuation of the works. The cases cited, of *Blakemore v. The Glamorganshire Canal Company*, *The Mayor of King's Lynn v. Pemberton*, and *Agar v. The Regent's Canal Company*, have no application to the present.

The doctrine which they establish is, that a compact has been entered into, which must be fully performed; here the objection is to this Company proceeding to the completion of its undertaking. But even if such a limitation is contended for existed, there is nothing in the case from which the Court can say that a reasonable time has elapsed. That question ought to have been submitted to the jury. The same objection applies to the point arising from the presumed abandonment of intention to continue the canal. *Lee v. Milner* (a) shews that such an intention, even if once formed, might have been abandoned; but where such was formed; there is nothing from which it could have been inferred. This is a question for a jury exclusively, and the plaintiff's counsel should have submitted it to them for their decision. No such fact is found; and there is nothing stated in the case from which such a fact could be inferred, even if the Court could draw the inference. The case states that the works on other parts of the line were still in progress, and had been so for six or seven years preceding. The same objection applies, again, to the point which has been made, that the funds of the Company are deficient. No such deficiency is stated. This, also, was a fact to be submitted to the jury. But the statute referred to does not bear the construction put upon it; it states merely that the funds were inadequate, not that they were exhausted. But the Company have power to take tolls, and have been in the receipt of tolls for many years, as the case states. The tolls, therefore, may have aided the inadequacy of the funds, and there may be now an ample fund for the completion of the whole undertaking. It is sufficient, therefore, to state that, without conceding the validity of any of the above objections, no foundation exists whereupon to raise them. Then, as to the supposed irregularity of the proceedings, it was altogether uncertain whether the plaintiff would ever suffer any injury to his

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

(a) 2 M. & W. 444.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

easements from the extension of the canal. The communication at present, as appears by the plan, between the plaintiff's mines and the Leeds and Liverpool Canal, is by his railway. The extension of the canal cuts the railway into two, and so interferes with it; but it does not appear, since the two canals communicate, that this will cause him any injury; the Company might, moreover, build a bridge over their canal, and carry his railway over it, if he preferred that course; and at the time when the lands were taken, all this was uncertain and unknown. How, then, could the damage be ascertained? What sample or specimen of damage existed? The damage by severance is provided for by the act in express terms, but it is also capable of accurate and certain computation; whereas the other is altogether uncertain, both as to its existence and its extent. The claim, therefore, for compensation, in respect of this conjectural damage to the plaintiff, was prematurely made. *Lev. Milner*. The easements themselves were not wanted by the Company, and it could only be by reason of damage to them from the use of that which they did take, that any claim to compensation could arise to the plaintiff. Neither had the plaintiff any estate or interest in the surface. This is conceded as to Wood's land and Hodgson's; but it is said that he had a reversion in those taken by the Company from Sir R. H. Leigh. But to this there are two answers: first, that the Company had purchased from Sir R. H. Leigh, under their agreement with him, the absolute interest, the fee simple; and Sir R. H. Leigh had power under the provisions of the 30th section, explained by the 53rd, of the 32 Geo. 3, c. 101, to contract on behalf of all who might have minor estates or interests carved out of the fee; and in that case the claim of the plaintiff, and of Atherton his tenant, would be to receive an apportionment, under the 53rd section, of the sum contracted for with Sir R. H. Leigh. But, secondly, the plaintiff had no reversion; it does not appear by the case that he demised from year to year to Atherton, from a day different from

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

that of the demise from year to year to him by Sir R. H. Leigh, therefore it does not appear that he had any reversion, and it was for him to shew it. The case of *Poultney v. Holmes* merely decided that if a tenant for a term demises for the whole term, reserving rent payable to himself, he may distrain. This is not disputed; but it is because a *tenure* exists between the parties; but a tenure may exist without a reversionary estate. And the case of *Pike v. Eyre* only shews that the proper description in pleading, of a demise from year to year by one who is himself tenant from year to year to another, is that it is a tenancy from year to year during the existence of the first demise, which is an authority to shew that there is no reversionary estate under such circumstances. But even if Thicknesse had any reversion, it was of no value, for he paid a higher rent than he received. Lastly, the notice of the meeting of the commissioners and the jury at Yarrow Bridge was sufficient. The clause referred to relates only to the meetings where the commissioners act and decide alone, and is not intended to apply to the meetings before the commissioners and the jury, where the danger of a secret or suddenly assembled meeting of the commissioners never did nor could exist. The jury warrant is to be returnable at a period not exceeding twenty-one days, nor less than nine, from the delivery of it to the sheriff, and that provision is not at all affected by the provision in the subsequent act, which requires fourteen days' notice of the meeting of the commissioners. This was given as to the meeting at Lancaster; and more than nine days elapsed between the signing of the warrant and the delivery of it to the sheriff.

Sir *W. Follett* in reply.—The argument that the plaintiff and his tenant were entitled to receive a part of the purchase-money agreed upon between Sir R. H. Leigh and the defendants, cannot be maintained. Sir R. H.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

Leigh contracted for himself, and sold, as he could only convey, subject to the lease from him to the plaintiff. The apportionment clause applies to those cases where either the jury award upon the whole, or where the sum agreed upon between the Company and the owner of the fee has been agreed upon by him on behalf of himself and those having estates in the lands, and as their agent to contract for the whole price as inclusive of their interests. It would be attended with the grossest injustice, if it were established that the owner of the fee-simple, possibly a bare reversion of no value, could contract for, and bind by his acts without their sanction or concurrence, all those who had prior estates in the lands, either of freehold or as termors. The owner of the reversion may have an interest in the promotion of a canal or railroad, which may induce him to promote its success, by bargaining for the sale of the lands at an inadequate price. Therefore it is necessary that these clauses should receive the limited construction contended for. Then, Atherton's interest has been taken without his receiving any compensation, and the proceedings have not been regular. [Upon the other points he replied by re-urging his former arguments.]

Lord ABINGER, C. B.—The first point stated in this case is the most important, the others being mere questions of form. The first point is, as to the duration of the powers of the Canal Company, and whether they are entitled at this distance of time to complete the line of their canal. I find nothing in the act of Parliament to limit the time in which they may do so. It has been argued that it would be attended with great inconvenience if the time were unlimited, for which reason the legislature (at least one branch of it) has made a standing order that there should be introduced into all acts of this sort an express limitation as to time. I do not see that that circumstance throws any light on the construction of this act of Parliament; it only shews that that branch of the

Legislature which made the standing order, was of opinion that some such limitation was proper. It has been argued that the lapse of time very often affords a reason for the interference of a court of equity. Now a court of equity may interfere on grounds of this nature, that when a canal company has obtained an act of Parliament for carrying into effect certain works without a limitation of time, and more especially where lands are to be taken under the act, and the works are not completed at a certain date, say till thirty years afterwards, during which time the company has seen the owners of the land make erections and improvements, and incur expenses on it, and, as in this case, place their fences on the termination of the canal at the point where it left off, under such circumstances a court of equity might say that a party so lying by and suffering another to be misled by his inaction, should be prevented from continuing his works at that late period, and destroying that which would never have been done but for his own negligence. I do not say that a court of equity might not interfere in such a case, but a court of law cannot. A court of law must construe this act now as if it were the day after the act passed. The powers of ordinary canal companies last for many years: they generally have a power not only to make a particular line of canal, but to make aqueducts to divert waters into it, to feed it at different points, and this they may do from time to time: nor can I say that these powers are limited, unless the act point out the time within which they should be exercised. Then it is said, that this act has found its limits, because the parties have not funds enough to carry it into effect, and that they are not authorized to violate the right of any individual unless they fulfil the condition imposed, of having a given sum of money for the purpose of the adventure; that perhaps might also be a good ground for a court of equity; but in this case the point does not arise. The case does not find that the Company had no money.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

The recital of the act, which passed in the year 1809, might at first glance seem to shew such a fact, but the Company had a right to raise the original sum by means of tolls received since the act of 1809, and the case does not find that that sum has not been raised in that manner. The point therefore does not arise in this case. That disposes of the question as to the duration of the powers of the Canal Company. Of the remaining points, the first is, that Mr. Thicknesse has a right to make a rail-road for certain purposes, and this is treated as an interest in land. I cannot say that it is any more than an easement, a right of way, which was not the subject of purchase, but only of compensation. I do not think it necessary for the commissioners to give compensation for the possibility of injury that might be occasioned to a rail-road, when perhaps it might not be done at all; or, if it is done, the compensation must be awarded when the damage is sustained. If the company should cut through this rail-road without making any bridge over it, or other means of communication, then the parties injured would have a right to apply to receive damages, and the right will accrue wherever that injury arises. The next point is, the claim in respect of the reversion. Now it appears to me that there is nothing to shew the plaintiff had such a reversion. I will not enter on the question whether by possibility a man, who is a tenant from year to year, may not have a reversion; I suppose he is tenant from year to year from Michaelmas to Michaelmas, and he underlets from March to March, that is a case where he may have a reversion; but the case before us does not state what this reversion is, but only says that the plaintiff underlet the land to Atherton as tenant from year to year, so that for aught that appears he may have underlet it for the same period of time as he had taken it from his landlord, in which case he would have no reversion, for he could not give to his tenant more than his own landlord gave to him. The company may treat as well for a reversion as for a subsisting lease, the act of

Parliament making "any interest" whatever the subject of contract. Suppose the commissioners agree to take the land from the owner of the reversion, subject to the present interest of a tenant, and for a lease which has five or six years to run, and they agree not to disturb the tenant at all, and to postpone their right to enter on the land, then if they do disturb the tenant, he has a right to call for compensation; but if the tenant is allowed to retain possession till the company really want to take the land, and is not disturbed before the determination of his interest, I do not see what damage he sustains. Suppose he had an interest in land, and the company were to say, "we shall want the whole of the land, but we do not mean to purchase it for two years," why should he receive compensation for that? I apprehend that neither the commissioners nor the jury would give it. [His Lordship then stated his opinion that the proceedings taken under the act were regular.] For these reasons the judgment will be for the defendants.

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

PARKE, B.—I am of the same opinion, and concur entirely with the Lord Chief Baron. As to the first question in the case, which is the important one, it appears to me that as the act of Parliament has limited no precise time in which its provisions are to be executed, they are to continue till the Company think proper to execute the work; and I am not aware of any decision of a court either of law or equity, that there is any implied limitation as to their being executed within a reasonable time from the passing of the act: but even supposing that the power of the Canal Company were to be executed within a reasonable length of time, it would be impossible for us to pronounce any opinion whether a reasonable time has elapsed or not. I found my opinion on this, that the act of Parliament has not limited any precise time, and there being no authority that the courts are to supply such a limitation,

Exch. of Pleas,
1838.

THICKNESSE
v
THE
LANCASTER
CANAL CO.

it is impossible for us to do so; and the powers of the 32 Geo. 3 continue, unless taken away in terms either express or implied by some subsequent statute. They are said to be taken away, because the Company were without funds, and could not proceed in making or continuing their canal so as to execute it on the terms pointed out in the 32 Geo. 3. It is impossible for us to say what the condition of their funds may be. But by the 59 Geo. 3, authority is given to them to make a fresh tax and build a new bridge, and to raise a further sum, and to sell land possessed by them at the time of the passing of that act, in which there is a clause restricting them, as to their additional powers, to two years. It appears, therefore, that the powers they had under the 32 Geo. 3, were left precisely as they were before, and the legislature only meant to restrict the additional powers which they had not by the prior acts of Parliament. I think, therefore, we must hold that they were in power to exercise all the rights they had by the 32 Geo. 3, and to do all necessary things for the purpose of carrying into execution the intention of the act:—and that disposes of the case on the substantial ground.

Then, reference is made to the rights upon the land which belongs to Mr. Wood, and Hodgson's devisees, and Sir R. H. Leigh, in all of which the plaintiff had a lease from the different proprietors, under which he had the power of going upon the closes and laying his railways on the surface; and it is stated that he had been injured in regard to the laying down of rails on the land of Wood and Hodgson's devisees, and also as to the rail-road itself which he had laid on the land of Sir R. Leigh, by virtue and in execution of the powers given by his lease. So far as all this goes, it appears to me it is not a case in which the Company are called on to purchase. I think the sections in the act of Parliament which enable the Company to treat with persons interested in land do not

Apply to persons who have a mere easement or right of passage over the land. All the Company want to purchase the lands themselves, and they must treat with those who have an interest in them either as tenants in fee, for life, or for years, in severalty or in common. The Company are also bound to make compensation to any person interested in lands, or having a right of way or easement into or over lands, for any damage he may sustain in consequence of the works performed by the Company under or by virtue of the powers of this act of Parliament; and in this case, if the plaintiff has sustained any real injury by the division of his rail-road, and if they do not put him in the same situation as he was before, by putting a bridge where the railway is, he will be entitled to receive full compensation from the Company. That disposes of all the questions except the last, which is founded on the supposition that the plaintiff has a reversionary interest in the premises occupied by Atherton. Now I think there is considerable weight in what was urged by Sir IV. Follett, that it would not be prudent for the owner of the reversion to make a bridge on the bank of the owner of a particular estate, and that it would be a hardship on a tenant if he had to make a bridge for a precise sum, and then only to take an aliquot portion of that sum. I think, in this case, if the plaintiff had any reversionary interest at all, the Company would have done right, before entering upon the land, to have made a bargain with him for the reversion; but it is enough for us to say, as to this point, that there is nothing in the special case that makes it possible to ascertain whether he really had any reversionary interest at all. He may have had some, as between him and the tenant; but even that does not appear; and he may have demised for the whole term, which would operate as an assignment. It is unnecessary, therefore, to decide that point. With regard to the argument on the alleged irregularity of the proceedings, as to assessing the value of the interest which Mr. Wood has,

Exch. of Pleas,
1838.

THICKNESSE
v.
THE
LANCASTER
CANAL CO.

Exch. of Pleas,
1838.

THICKNESSE

v.

THE
LANCASTER
CANAL CO.

according to the view I take of the case, it is wholly unnecessary to decide that question, the only point for us being as between the company and Thicknesse.

GURNEY, B.—I entirely concur with my Lord Chief Baron and my Brother *Parke* on all the points. It was not until long after this act passed in 1792, that the legislature entertained the idea of restricting the time of operation of such acts as these, and I am aware of several without such restriction.

Judgment for the defendants.

ONLEY v. GARDINER and Another.

The enjoyment of an easement, as of right, for twenty years next before the commencement of the suit, within the stat. 2 & 3 Will. 4, c. 71, means a continuous enjoyment as of right, for the twenty years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the twenty years.

And such unity of possession need not be specially replied under the 5th section.

TRESPASS for breaking and entering two closes of the plaintiff, called the Click Head Meadow, and the Rock Hill Cotts. The defendant pleaded a right of way over the closes in question, to and from a close in his occupation, called the Click Head Coppice, claiming it by enjoyment for twenty years next before the commencement of the suit, under the stat. 2 & 3 Will. 4, c. 71, s. 2. The replication traversed the right as pleaded, and thereupon issue was joined. At the trial before *Patteson, J.*, at the last Worcester Assizes, the defendant, in support of his plea, proved that about forty years ago, the close now called the Click Head Coppice was a hop-yard, and that at that period hops used to be carried thence, over the plaintiff's closes, to the highway; and also that once in every six or seven years hop-poles were carried across them to and from the hop-yard. This user of the premises had however long ceased, and the hop-yard was afterwards planted as a coppice: and it appeared that for many years, down to a period about fifteen years before the commencement of the suit, all the three closes had been occupied together: from that period to the com-

commencement of the action, the defendant proved a user of the way for all purposes. It was objected for the plaintiff, that under these circumstances the plea was not sustained, for that there had not been an enjoyment *as of right*, i. e. adversely to the owner or occupier of the closes over which the way was claimed, for the full period of twenty years next before the suit. The learned judge reserved the point, and a verdict was found for the defendants, leave being reserved to the plaintiff to move to enter a verdict for nominal damages.

Exch. of Pleas,
1838.

ONLEY
v.
GARDINER.

In the beginning of this term, *Talfourd*, Serjt. obtained a rule nisi accordingly, against which

Maule and *R. V. Richards* shewed cause.—First, the defendants have sufficiently shewn an enjoyment as of right for twenty years next before the commencement of the suit, within the meaning of the statute. That the statute does not require a *continuous* enjoyment during the whole period of twenty years, is manifest from the definition given in the 4th section, of what shall be deemed an *interruption* of the right within s. 2, viz. “that no act or matter shall be deemed to be an interruption, unless submitted to or acquiesced in for one year” after notice. [*Parke*, B.—*Interruption* means an obstruction by the owner of the locus in quo, but is to amount to nothing unless acquiesced in for a year.] The reasonable construction of the statute is, that the twenty years’ enjoyment next before the commencement of the suit means twenty years’ actual enjoyment, not interrupted by a year’s acquiescence in an obstruction. And that construction is strongly supported by reference to the 8th section, which provides for the suspension of the right during the term of forty years, in the case of an outstanding estate for life or years. The legislature did not mean by the use of the words “next before &c.” to provide against any suspension of the enjoyment during the twenty years: for that is provided for by the words “without interruption,” as they

Exch. of Pleas,
1838.

ONLEY
v.
GARDINER.

are explained in s. 4. If the twenty years, however composed, extend to the period of the commencement of the suit, that complies with the meaning of the words "next before" the commencement of the suit: so that, if the twenty years were composed of four periods of five years, at intervals broken by periods of unity of possession, that would satisfy the words of the statute, provided the last period of five years reached down to the commencement of the suit. An opinion was certainly expressed by the Court, in *Bright v. Walker* (a), that enjoyment as of right is inconsistent with unity of possession during all or part of the time: but is submitted that that is not borne out by a more strict consideration of the statute. In *Tickle v. Brown* (b), the "enjoyment as of right" is defined to consist in an enjoyment had, not secretly or by stealth, or by sufferance or permission, but openly and notoriously, by a person claiming to use it without danger of being treated as a trespasser.

But secondly, the fact of the unity of possession ought at all events, under s. 5, to have been specially replied. All matters of fact or of law *not inconsistent with the simple fact of enjoyment* are to be specially pleaded. [*Parke, B.*—That is, not inconsistent with the simple fact of enjoyment *as of right*.] Enjoyment *as of right* would appear to be properly put in contradistinction to enjoyment under leave granted toties quoties—meaning an enjoyment by a party claiming under a right to enjoy. Here there was actual enjoyment, and by a person who had the right to do all he did. The words of the act ought to be applied to any right which comprehends the thing done. Here the party had the land, and with it the right of way over it. [*Parke, B.*—If your argument be well founded, a tenant for forty years would acquire an indefeasible right of way. You could not reply that he had a lease; it must appear, in order to defeat the right, that it was enjoyed

(a) 1 C. M. & R. 219.

(b) 4 Ad. & Ell. 382; 6 Nev. & M. 230.

under a consent or agreement in writing expressly given *for that purpose.*] The lease would be for that purpose amongst others: it would comprehend the grant of a right of way during the term. A grant of way is a grant to use the surface of the land in a special and limited manner; a lease is a grant to use it in any manner consistent with certain stipulations. [*Parke, B.*—The lease does not give the *right of way* at all; it is a grant of the soil itself, not of any easement over it. The “enjoyment as of right” means an enjoyment of the easement *as such.*] It is submitted that the true spirit and meaning of the 5th section is this: that where the plaintiff does not mean to controvert the fact done, but says there was some grant under which it was exercised otherwise than strictly of right, he must reply it, and cannot introduce it under the general traverse of the right: and such seems to be the doctrine laid down by the Court in *Tickle v. Brown*. The object of the statute certainly was not to incumber parties with greater difficulties of pleading than before; and it is clear the defendant in this case might have claimed the right by immemorial usage, and so pleaded it.

Exch. of Pleas,
1838.

ONLEY
v.
GARDINER.

PARKE, B.—We shall probably not trouble the counsel on the other side, but in the meantime the Court will consider the case. My strong impression is, that the act requires a twenty years' continuous enjoyment of the easement as an easement; and also that unity of possession need not be replied.

Cur. adv. vult.

The judgment of the Court was delivered a few days afterwards, by

PARKE, B.—The plea of actual enjoyment, as of right, of a way over the locus in quo, for twenty years next before the commencement of the suit, cannot be supported. We are all clearly of opinion, that in order to

Exch. of Pleas,
1838.

ONLEY
v.
GARDINER.

entitle the defendant to the benefit of the statutory plea, it must be an enjoyment of the easement *as such*, and as of right, for a *continuous period of twenty years next before the suit*, without such interruption as is defined in the act; upon which nothing turns in this case. This appears to us to be the natural construction of the 4th section of the statute 2 & 3 Will. 4, c. 71, by which construction we ought to abide, unless it could be made out that it would lead to some absurdity or manifest incongruity with the intention of the legislature, to be collected from every part of the statute. No such absurdity or inconsistency would follow from this construction; on the contrary, to hold that the words might be satisfied by an enjoyment for different intervals, which added together would be twenty years, the last continuing up to the commencement of the suit, would be to let in a great number of cases in which the presumption of a grant never could have existed before the statute. For instance, if the occupier had used the road openly for a year or two, and then uniformly asked permission on each occasion, or only used it secretly and by stealth for some years, and then resumed the enjoyment of it, no one would contend that a grant could have been presumed, because the intervals of enjoyment united might amount to twenty years. A similar reason applies to intervals of unity of possession, during which there is no one who could complain of the user of the road. It would be no answer to say, that in one particular case, where the land over which the right is exercised is out on lease, the legislature had provided for the non-continuity, if I may so say, of one of the periods mentioned in the act; but in truth it has not so provided, for the effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned.

It appears to us, therefore, that according to the words

and meaning of the act, the enjoyment of the easement must be continuous; and the Court has already intimated its opinion to that effect, in the case of *Monmouthshire Canal Company v. Harford* (a).

Exch. of Pleas,
1838.

ONLEY
v.
GARDINER.

That an enjoyment must be of an easement *as such*, is a matter on which we feel no difficulty; and the Court has already put this construction on the act, after some consideration, in the case of *Bright v. Walker* (b), though the precise point was certainly not in judgment. As to the question, whether the proof of unity of possession is admissible under the traverse of the plea, no doubt can be entertained since the decision of the case of *Monmouthshire Canal Company v. Harford*, and its confirmation by the Court of King's Bench in *Tickle v. Brown* (c), and by the Court of Common Pleas in *Beasley v. Clarke* (d). The "simple fact of enjoyment," referred to in the fifth section, is an enjoyment "*as of right*," and proof that there was an occasional unity of possession, is as much in denial of that allegation as the occasional asking permission would be.

We think, however, that under the circumstances, the defendant should have leave to amend, by pleading the right immemorially.

Rule accordingly.

Talfourd, Serjt., and *W. J. Alexander* appeared to argue in support of the rule.

(a) 1 C. M. & R. 631; 5 Tyr. 85.

(c) 4 Ad. & Ell. 382.

(b) 1 C. M. & R. 211; 4 Tyr.
502.

(d) 2 Bing. N. C. 708; 3 Scott,
258.

Exch. of Pleas,
1838.

Sir W. H. JOLLIFFE, Bart., v. MUNDY.

The plaintiff in an action of trespass for mesne profits having been nonsuited at the trial, obtained a rule for a new trial, which was silent as to costs. The plaintiff drew up and served the rule. Another action was afterwards commenced against the defendant in the name of John Doe, for the recovery of the same mesne profits; whereupon the defendant obtained a rule for staying the proceedings therein, until the plaintiff should discontinue the former action. The plaintiff's attorney gave notice of trial in the action in which a new trial was ordered, but afterwards countermanded it; and the defendant's attorney also gave notice of trial by proviso, which also was countermanded. After the Assizes, the plaintiff discontinued:—*Held*, that the defendant was not entitled to the costs of the trial.

CRESSWELL had obtained a rule to shew cause why the Master should not review his taxation of the defendant's costs in this cause, under the following circumstance. In Easter Term, 1836, an ejectment was brought against the defendant in the Court of King's Bench, on the several demises of the plaintiff, Sir William Jolliffe, and C Hylton Jolliffe, for the recovery of a farm and lands in the borough of Petersfield, which was tried at the Hampshire Summer Assizes, 1836, when a verdict was found for the plaintiff; and in the following Michaelmas Term final judgment was signed, and a writ of possession issued and executed. The present action, of trespass for the mesne profits, was afterwards brought in this Court, and was taken down to trial at the last Spring Assizes, when the plaintiff was nonsuited, on the ground that the legal interest in the premises appeared to be in Colonel Jolliffe; leave being given to the plaintiff to move to enter a verdict for him, with nominal damages. In last Easter Term, a rule was accordingly obtained for that purpose, or for a new trial; and in Trinity Term (May 28th) the rule was made absolute for a new trial. On the 9th June, another action was commenced in this Court against the defendant for the same mesne profits, in the name of John Doe; whereupon a rule was obtained, calling upon the plaintiff to shew cause why the proceedings in the latter action of *Doe v. Mundy* should not be stayed until the determination of the cause of *Jolliffe v. Mundy*, or until the plaintiff in the latter action should discontinue; and cause being shewn in chambers, the rule was made absolute on the 3rd of July. There were contradictory statements in the affidavits as to whether the rule for a new trial, which was drawn up by the plaintiff, was served or not (a); and the defendant's

(a) The judgment of the Court assumes that it was.

Attorney swore that he believed no intention had at any time existed on the part of the plaintiff or his attorney to take advantage of the permission thereby given. The plaintiff's attorney, however, had served notice of trial for the last assizes, which was afterwards countermanded; and on the other hand, the defendant's attorney served notice of trial by proviso at the same assizes, which was also countermanded. On the 25th of October, the plaintiffs obtained and served a rule to discontinue, with an appointment to tax the costs; and the Master having, on taxation, disallowed to the defendant the costs of the trial, the present rule was applied for, the defendant's counsel contending, on the authority of the cases of *Sweeting v. Halse* (a), *Jackson v. Hallam* (b), and *De Rutzen v. Lloyd* (c), that the defendant was entitled, under the circumstances, to the costs of the trial.

Exch. of Pleas,
1838.

JOLLIFFE
v.
MUNDY.

Erle (*Butt* with him) shewed cause.—The defendant is not entitled to the costs of the trial, the rule for setting aside the nonsuit having been silent as to the costs. By the discontinuance, the action was determined from that time; but the act of discontinuance could not create a liability to costs, which did not exist at the time of the discontinuance. The tendency of the modern cases is rather to limit than to extend the right of the party to costs, against whom a new trial has been granted. In *Peacock v. Harris* (d), a new trial having been granted after verdict for the plaintiff, on the ground of the admission of improper evidence, the plaintiff gave fresh notice of trial, whereupon the defendant withdrew his plea and suffered judgment by default, and a writ of inquiry was executed: it was held that the plaintiff was not entitled to

(a) 9 B. & Cr. 369, n.; 4 M. & R. 545.

(b) 2 B. & Ald. 314; 1 Chit. R. 19.

(c) 5 Ad. & Ell. 456; 2 N. & P. 213.

(d) 5 Ad. & Ell. 449; 1 N. & P. 240.

Exch. of Pleas,
1838.

JOLLIFFE
v.
MUNDY.

his costs of the first trial. *Howarth v. Samuel* (a) is a direct authority against the defendant. There, on setting aside a verdict for the plaintiff, the costs were directed to abide the event, and then the plaintiff discontinued; the defendant was held not to be entitled to the costs of the trial. And *Bayley, J.*, applies the proper test of such a case:—"Discontinuance is a mode of terminating a suit by the act of the plaintiff himself; and it must be attended with the same consequences as to costs, as if the event of the suit had been determined by the verdict of a jury. Now if the defendant, upon a second trial, had obtained a verdict, he would not have been entitled to the costs of the first trial, and therefore he cannot be entitled to them in the event which has happened." *Gray v. Cox* (b) is another decision to the same effect. *Newberry v. Colvin* (c) and *Porter v. Cooper* (d), are additional authorities for the plaintiff. As to the cases relied on by the other side, *De Rutzen v. Lloyd* is distinguishable on the ground that there the defendant never drew up the rule for a new trial; the cause, therefore, stopped at the point when there was a verdict for the plaintiff, not legitimately set aside by any subsequent order of the Court. In *Jackson v. Hallam*, the defendant, after he had obtained a rule for a new trial, gave a cognovit, which the Court considered as an admission that the plaintiff was entitled to succeed on the merits. *Sweeting v. Halse* was decided on the particular circumstances of the case, and with reference to the nature of the objection (viz. to the want of a stamp) taken by the plaintiff on the first trial. But the authorities before cited all concur in establishing the principle, that where a rule for a new trial is silent as to costs, no costs are allowable, and that ulterior proceedings cannot create a liability for

(a) 1 B. & Ald. 566; 1 Chit. R. 633.

(b) 5 B. & Cr. 458; 8 D. & R. 220.

(c) 2 Dowl. P. C. 415.

(d) 2 C. M. & R. 232.

Costs, which did not exist at the time when they were taken.

Exch. of Pleas,
1838.

JOLLIFFE

v.
MUNDY.

Cresswell and *Moody*, contra.—It is clear from all the proceedings in this case, that the plaintiff never intended to try the cause a second time. He discontinued merely in order to burden the defendant, if possible, with the costs of the trial. *Sweeting v. Halse* is therefore an authority directly in point for the defendant. Lord *Tenterden* there says, “*Jackson v. Hallam* is an authority in point; for here the plaintiff, by discontinuing the action, has admitted that the verdict was right.” In *Jackson v. Hallam*, the defendant, without going to a second trial, gave a cognovit; and the Court, acting upon the authority of *Booth v. Atherton* (a), held that he had thereby acknowledged that he had no ground of defence to the action, and that the verdict was right on the merits. Those decisions are expressly recognised and distinguished in all the subsequent cases relied upon by the other side: in *Gray v. Cox*, *Porter v. Cooper*, *Peacock v. Harris*, and *De Rutzen v. Lloyd*. In the last case all the authorities were reviewed, and the Court held that the defendant having abandoned his rule for a new trial, the plaintiff ought not to be in a worse situation than if the application had never been made, and therefore ought to have the costs of the trial. The present defendant has in effect done the same.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B.—In this case, the plaintiff was nonsuited at the trial of an action for mesne profits, with leave reserved by the learned Judge to enter a verdict for nominal damages. A rule was made absolute afterwards to set

(a) 6 T. R. 144.

Exch. of Pleas,
1838.

JOLLIFFE
v.
MUNDY.

aside the nonsuit, but not to enter the verdict, and a new trial was ordered. The plaintiff drew up and served the rule absolute, but instead of proceeding to trial, obtained a rule to discontinue on payment of costs, having, in the mean time, brought another action in the name of the nominal plaintiff. And the question is, whether he is to pay the costs of the former trial.

Supposing that there was no previous decision on this subject, there would seem to be little doubt as to the course which ought to be pursued. The plaintiff must be taken to have been improperly nonsuited at the trial, and the Court to have corrected the error of the Judge; and in pursuance of the invariable rule in such cases, each party would have to bear the costs of the abortive trial, the Court annulling that proceeding, and replacing each in the situation in which he stood before. If the plaintiff had declined to proceed afterwards to trial, and left the defendant to his remedy, he must have carried the cause down to proviso, and having obtained a nonsuit, he would then have been entitled to the costs of the latter, but not of the former trial. If, instead of putting the defendant to this useless expense, the plaintiff applies to discontinue, it seems reasonable to grant him that privilege, just as if he had applied before the first trial, and to save the defendant the payment, in the first instance, of the costs of an useless trial by proviso, and the plaintiff from the ultimate liability to reimburse such part as would be allowed on taxation. This seems the reasonable course to follow, if there is no authority to the contrary.

It is argued that there is:—and this makes it necessary to examine the cases which have been decided on this subject, and which are unfortunately somewhat conflicting.

Where the first trial was abortive in consequence of a defective statement of a special case, and a new trial was ordered, the party ultimately succeeding was held not en-

led to the costs of the first trial, in *Hankey v. Smith* (a), and *Smith v. Haile* (b). In *Booth v. Atherton* (c), it was held, that where the first trial was useless from the same cause, the defendant afterwards giving a cognovit, was bound to pay the costs. The previous decision of *Smith v. Haile* was not cited in the last case: and the Court gave no reasons for their judgment. It appears, however, to have turned upon the fact that the defendant gave a cognovit, and was thereby supposed to have acknowledged that he had originally no ground of defence to the action, and ought not to have put the plaintiff to the expense of a trial. This reason was given for a similar course, in the case of *Jackson v. Hallam* (d), where a verdict for the plaintiff was set aside for a mistake of the Judge, and a new trial granted, but the defendant afterwards suffered judgment by default, and gave a cognovit for the damages. It may be doubted whether this reason is quite satisfactory, for a person may suffer judgment by default, or even give a cognovit, without necessarily admitting that the former verdict was right upon the merits; the death or absence of witnesses, or the fear of further expense, may have induced such a course. It is difficult to distinguish a judgment by default, with a cognovit for the damages, from a simple judgment by default, or a judgment by default, after leave to withdraw the defendant's pleas: and yet in a case so situated, in *Peacock v. Harris* (e), the Court of King's Bench refused to allow the costs of the former trial which had failed of effect, and a verdict for the plaintiff had been set aside for misdirection of the Judge.

This decision, therefore, must be justly considered as having greatly shaken the authority of *Jackson v. Hallam*, and the cases founded on that decision. One of these was that of *Sweeting v. Halse* (f), which bears the closest

Esch. of Pleas,
1838.

JOLLIFFE

v.
MUNDY.

(a) 3 T. R. 507.

(b) 6 T. R. 71.

(c) *Ib.* 144.

(d) 2 B. & Ad. 317.

(e) 5 Ad. & Ell. 449.

(f) 9 B. & Cr. 369.

Before this last case, another had occurred, which not to be overlooked. In *Gray v. Cox* (a), the Court had a verdict, a new trial ordered, nothing said as to costs, and then there was a discontinuance. The Court said it was a rule that a party should never have a second trial of a trial in which he had been defeated. That rule does not apply to this case. But they also said that if the defendant had succeeded on the second, he would have had the costs of the former trial, and it is difficult to find a reason why the defendant should be in a better situation, because the plaintiff should not have the cause tried a second time—an observation which certainly has a very important bearing upon the case.

The case of *Robertson v. Liddell* (b) is indeed one in which the plaintiff, who had failed on the first trial, succeeded on the second trial, was nevertheless held to be liable to the costs of both; but that was entirely on the ground that the agreement of the parties had placed them on the same footing as if a special case had been reserved for a first trial.

The last decision on this subject is that of *Dunn v. Lloyd* (c), in which there was a verdict for the plaintiff, a rule for a new trial for misdirection, which was drawn up by the defendant, but having been drawn up and signed by the plaintiff, the defendant disclaimed the propriety of a new trial, and the Court, though not without hesitation and doubt on the part of some of its

allowed the plaintiff the costs of the first trial, expressly on the ground that the defendant had abandoned the rule for a new trial, and was in the same situation as if there had been no rule at all. The former verdict therefore stood, and the only mode by which the plaintiff could recover the fruits of his action was by a judgment founded on that verdict, which would, of course, include the costs of obtaining it. It by no means follows that the Court would have been of the opinion that these costs were recoverable, if, after drawing up and serving the rule, the defendant had obtained an order to strike out his pleas and had suffered judgment; indeed, the very recent case of *Peacock v. Harris* shews they would not.

Exch. of Pleas,
1838.

JOLLIFFE
v.
MUNDY.

Before this case, another had occurred in this Court, which is against the claim for the former costs. The case is that of *Porter v. Cooper* (a), in which a writ of inquiry was set aside for a mistake of the under-sheriff, and the defendant having then paid the debt, the Court decided that he was not bound to pay the costs of the former trial; and Lord Abinger said that the plaintiff was not in a worse situation than if he had gone down to a second trial, and recovered the same amount of damages.

In this state of the authorities, we think we are not bound by that of *Sweeting v. Halse*; and we decide against the application in this case, on the ground that neither party was entitled to the costs of the first abortive trial in the first instance, and that the plaintiff, by discontinuing, has not made himself so. This step, we think, he ought to be permitted to take, by which he may save the defendant the trouble and extra costs of a new trial by proviso; and yet places him just in the same situation as if the trial had been had, as to the prior costs: and therefore the rule must be discharged.

Rule discharged.

(a) 2 C. M. & R. 232.

Exch. of Pleas,
1838.

HARRISON *v.* TIMMINS.

Under the powers given by certain acts of Parliament, a Director of the West Cork Mining Company was sued, and judgment recovered, in an action on a contract for work and labour, &c. done for the Company:—*Held*, that the Court had no power to order execution to issue against him, the statutes in question not making such a director personally liable.

THIS was an action against the defendant, as one of the Directors of a Company called the West Cork Mining Company, and the declaration stated it to be brought against him in that capacity according to the form and effect of certain acts of Parliament, passed respectively in the 4 & 5 Will. 4, c. 69, and the 1 Vict. c. 88; and the declaration alleged that the Company was indebted to the plaintiff in the sum of &c., for work and labour &c., and being so indebted, that the said Company promised the plaintiff; and then alleged a breach by the Company, and the defendant as such Director. Plea, that the said Company did not promise modo et formâ. At the trial a verdict was found for the plaintiff, and judgment was entered up accordingly. *The Attorney-General* had, on a former day, obtained a rule to shew cause why the defendant should not pay the amount of damages and costs recovered, or why the plaintiff should not be at liberty to sue out against him upon the said judgment.

Cresswell and *J. Henderson* shewed cause.—This application is an experiment to obtain the opinion of this Court whether the plaintiff is entitled to issue execution against the goods of an individual sued as a nominal defendant, under the provisions of an act of Parliament, 4 & 5 Will. 4, c. 69, s. 3; but, unless there is some provision in the act to authorize it, the Court will not listen to such an application. The statute, by the 3rd section, gives power to sue and be sued in the name of the managing director, or in the name of any one director for the time being. It enacts, “that all actions, suits, and proceedings, whether at law or in equity, or otherwise, to be commenced, instituted, and prosecuted or carried

or on behalf of the said Company, against any
 or persons, body or bodies politic or corporate,
 such person or persons, body or bodies politic or
 te, is or are or then shall be a member or members
 said Company or not, shall and lawfully may be
 ced, instituted, and prosecuted, or carried on in
 e of the person *who shall be for the time being the*
ing director of the said Company, or in the name of
director for the time being of the said Company, as
inal plaintiff or party proceeding for and on behalf
 aid Company; and that all actions, suits, and pro-
 s, whether at law or in equity, or otherwise, to be
 ced, instituted, and prosecuted, or carried on
 the said Company by or on behalf of any person
 ns, body or bodies politic or corporate, whether such
 r persons, body or bodies politic or corporate, is or
 all then be a member or members of the said Com-
 not, shall and lawfully may be commenced, insti-
 nd prosecuted, or carried on against the person
 ll be for the time being such managing director, or
 any one director for the time being of the said
 y, as the *nominal defendant* or party proceeded
for and on behalf the said Company." It is per-
 ain from this section, that the action is brought
 he Company, although in the name of the director
 inal defendant; it merely prevents him, for the
 ublic convenience, from pleading in abatement; for
 tter part of the same section it is enacted, "that
 n, suit, or other proceeding to be commenced,
 d, and prosecuted, or carried on by or against the
 npany by virtue of this act in the name of such
 g director or directors, shall abate or be discon-
 or prejudiced by the death, resignation, removal,
 alification of such managing director or directors,
 y act of such managing director or directors; but

Exch. of Pleas,
 1838.

HARRISON
 v.
 TIMMINS.

Exch. of Pleas,
1838.

HARRISON
v.
TIMMINS.

the managing director or any one director of the said Company for the time being as aforesaid, shall always be deemed the plaintiff or party proceeding, or (as the case may be) the defendant or party proceeded against, for or on behalf of the said Company in such action, suit, or proceeding." There is nothing to shew that this defendant was a member of the Company at the time the contract was entered into. Now, the 4th section provides that it shall be lawful for the directors of the Company, or *any three or more of them*, at any board or meeting of the said Company, of which seven days' notice shall be given from time to time, to treat, contract, and agree for the purchase of lands. Then the 16th section provides for the form in which the contract shall be made. It enacts, "that in every lease, contract, or agreement which shall be made by any three or more of the directors of the said Company pursuant to the provisions of this act, shall be expressed that such lease, contract, or agreement, is made and entered into by such directors as directors of the said Company, and for the benefit of the whole of the said Company exclusively, and not for their individual or other benefit or advantage: and in case it shall be necessary to put any such lease, contract, or agreement in suit, either at law or in equity, then and in every such case it shall and may be lawful for the party so putting such lease, contract, or agreement in suit, to make the managing director, or any one of the directors of the said Company for the time being, the sole plaintiff or defendant, as the case may be, in the said suit, although such managing director or directors may not be a party to such lease, contract, or agreement: Provided always, nevertheless, that no suit shall abate by reason of the death, registration, or disqualification of such managing director or directors: and provided always, that *such managing director, and the said directors who shall so as*

*said make, or execute any lease, contract, or agree-
 , shall in no case be personally responsible to any party
 the damage sustained by such party, by reason of a
 sh on the part of the said Company of any covenant,
 so, undertaking, matter, or thing, in any such lease,
 act, or agreement: but it shall and may be lawful for
 arty entitled to take out execution for and in respect
 ny judgment obtained against any such managing
 tor or any such director as aforesaid, and levy the
 nt of his, her, or their damages and costs upon, the
 ved fund thereafter provided, and all other pro-
 , whatsoever belonging to the said Company." It
 be said that that section only applies to a written
 act; but it would be strange if a different construction
 adopted in the case of a verbal contract, and, though
 personally responsible upon a written contract, a
 tor should be held to be responsible when he entered
 a verbal one. By the 1 Vict. c. 88, which was an act
 mending the provisions of the former act, and which
 es it, it is enacted by section 8, as follows: " And
 eas doubts have arisen as to the manner in which
 ution ought to be levied upon judgment recovered
 nt the said Company, or the directors thereof, ac-
 ing to the provisions of the said act, and it is ex-
 ent to remove such doubts; be it therefore declared
 enacted, that it shall and may be lawful to and for
 person or persons entitled to take out execution for
 in respect of any judgment already obtained or here-
 : to be obtained against any managing director, as a
 inal defendant for and on behalf of the said Company,
 vy the amount of his, her, or their damages and costs
 n the reserved fund of the said Company, and all other
 perty whatsoever belonging to the said Company."
 that the reserved fund of the Company, and any
 perty they may be possessed of, is made liable to an*

*Exch. of Pleas,
 1838.*

HARRISON
 v.
 TIMMINS.

Exch. of Pleas,
1838.

HARRISON
v.
TIMMINS.

execution upon any judgment obtained against the Company, though nominally brought against a director. This defendant, in his individual capacity, is a stranger to the record, and execution cannot issue against a stranger to the record, except in the instance of his being placed in a representative character, as executor or administrator. If it were otherwise, it would create great injustice, inasmuch as by the statute this defendant has been deprived of the advantage of pleading the ordinary defences, such as bankruptcy, release, &c., which would go to his personal discharge. There are two cases on this subject. In *Bartlett v. Pentland*, Secretary of the St. Patrick's Assurance Company (a), an application of somewhat a similar nature to the present was made and refused. By stat. 5 Geo. 4, c. 160, s. 1, all actions brought against the St. Patrick's Assurance Company of Ireland, were to be prosecuted against the secretary for the time being, or against any member of the Company, as the nominal defendant for them and on their behalf. By section 4, execution upon any judgment in such action might be issued against any member or members for the time being of the Company. By section 8, in case such execution against the members for the time being should be ineffectual, the party so having obtained judgment might issue execution against any person who was a member at the time the contract was entered into upon which such action might have been brought: but no such execution was to be issued without leave of the Court:—and it was held that a party who had brought an action and obtained judgment against the secretary, could not lawfully issue execution against another member of the Company without having previously, by leave of the Court, suggested on the record facts to shew that the party against whom so issued execution, was liable as a member of the Com-

(a) 1 B. & Ad. 704.

pany. In that case the statute provided that execution might be issued against any member of the Company; yet it was held that it could not be done without entering a suggestion on the record shewing his liability. But, in the present case, this act makes no director personally liable: and the Court has no power to order execution to be issued. In *Wormwell v. Hailstone* (a), it was held, in an action against the clerk of the trustees of a turnpike road, under a statute which permitted the trustees to sue and be sued in the name of their clerk, that execution could not issue against the clerk personally. There the clerk was a statutory defendant, as the present defendant is in this case.

Exch. of Pleas,
1838.

HARRISON
v.
TIMMINS.

The Attorney-General and Bayley, contra.—This is the case of a private Company, not of a corporation, and as such, they are a mere private partnership, and each member of it is individually liable for all contracts made by the Company: and there is nothing in this act to limit their liability. That being so, a party is not precluded from taking in execution the separate property of any one of the members of the partnership. There is nothing in either of the statutes to exempt the members of the Company from the ordinary liability. The excepted cases contemplated by the 16th section of the statute, of obligations arising out of written contracts and agreements, rather shews that they were to be liable in all other cases not expressed. It cannot be pretended that this demand comes within that section:—then the expression of the one is the exclusion of the other. In *Bartlett v. Pentland*, the defendant was not a party to the record: and it was held that execution could not be sued out against him, without a suggestion being entered to shew his liability, and giving him an opportunity of being heard. But here,

(a) 6 Bing. 668; 4 M. & P. 512.

Exch. of Pleas,
1838.

HARRISON
v.
TIMMINE.

the defendant is a party to the record, and has had the opportunity of being heard. The case of *Wormwell v. Hailstone* has no application to the present. That was an action against the clerk to the trustees of a turnpike road, a mere servant of the trustees, who could not have been a contracting party. There was no mode at common law by which he could have been sued. But here, the present defendant could have been so sued, as a partner in the undertaking. [*Parke, B.*—The difficulty here is, that this defendant *may be* a mere stranger, and may not have been a member of the Company at the time of the contract having been entered into]. It is not shewn that he was not so. This is the case of a partner who, by law, is allowed to be sued alone, instead of the whole body, who are sued through him. The defendant has pleaded to the action in his character of director, and, being a shareholder, he is liable, as any ordinary partner, to have execution issued against his separate property. *Vansandau v. Moore* (a); *Rex v. St. Catherine's Dock Company* (b).

Cur. adv. vult.

The judgment of the Court was subsequently delivered by

PARKE, B.—In this case, a verdict had been recovered by the plaintiff against the defendant as a nominal defendant on behalf of the West Cork Mining Company, and an application was made to the Court for a rule that the defendant should pay the amount recovered, or that the plaintiff should be at liberty to issue execution for that amount against the defendant. It would be sufficient, in order to dispose of the application, to say that the Court

(a) 1 Russell, 441. (b) 4 B. & Ad. 360; 1 Nev. & Man. 121.

ould not grant any rule to pay money which they are not prepared to enforce by attachment in case it was dis-
 eeyed, and that if the plaintiff is entitled to issue exe-
 ction against the defendant, he may do so without the
 ave of the Court; but we are not disposed to discharge
 e rule on this ground, and we have been anxious to give
 e question full consideration, and to afford the plaintiff
 remedy upon his judgment by some modification of the
 le, if, upon the construction of the acts of Parliament
 establishing the Company, we are enabled to do so. We
 ink, however, that the defendant can in no way be made
 ersonally liable, and the rule must therefore be dis-
 charged.

Exch. of Pleas,
 1838.

HARRISON
 v.
 TIMMINS.

The 4 & 5 Will. 4, c. 69, s. 3, provides for suits against
 the Company; it is as follows. [The learned Baron here
 read the section.] Upon this section alone it would seem
 that the director for the time being, who should be selected
 as a defendant, could not be made personally responsible.
 He is a “*nominal*” defendant only; he continues so
 though he should resign, be removed, or disqualified, and
 so, totally disconnected from the Company; his name would
 still be used though he should die; and as the action is to
 be brought against a director *at the time the suit is insti-*
tuted, he may be a person who was a perfect stranger to
 the Company when the cause of action accrued. We
 cannot suppose, therefore, that the legislature meant such
 a defendant to be personally liable. But it would be very
 unjust if they had not provided some remedy. They
 might have enacted that, after a recovery against a nominal
 party, each of the partners at the time the cause of action
 arose should be individually liable, a remedy which was
 given by the statute establishing the St. Patrick’s Insur-
 ance Company, upon which the question arose in the case
 of *Bartlett v. Pentland* (a); or they might have enacted

(a) 1 B. & Ad. 704.

Exch. of Pleas,
1838.

HARRISON
v.
TIMMINS.

that each partner at the time of the action brought should be responsible, which would be a strong measure, but which was, nevertheless, enacted by the same statute; but this act of Parliament gives no such remedy. It does, however, provide by the 16th section, explained by the subsequent statute 1 Vict. c. 88, s. 8, that it shall be lawful for one who has recovered judgment against a nominal defendant, to levy the amount on the reserved fund, or on any other property of the Company; and this remedy, which is thus provided, is one of a different character to that which the creditor would have had at common law if he had sued the whole of the partners, for he could only have taken the joint or several property of those who were partners *at the time of the contract*; but this act enables him to take all the joint property of the partners at the time of execution executed, whether they were partners or not at the time of the contract. The effect of the provisions in both acts is to make the Company a quasi corporation, with the privilege to sue and be sued by a mere name, with an exemption of personal liability on the part of its members, and a liability of all joint stock property, whenever required.

We therefore think that the defendant cannot be made in any way personally responsible, and the rule must be discharged.

Rule discharged.

Exch. of Pleas,
1838.

COWPER and Others v. SMITH and Wife.

ASSUMPSIT on a written guarantee given by the female defendant, before her marriage, to the plaintiffs, for goods to be supplied by them to one Thomas Green, to the extent of 400*l*. It was provided by the guarantee, that the plaintiffs should have full liberty to extend the period of credit to Green, and to hold over or renew bills, notes, or other securities given by him; "and to grant to Green, and the persons liable upon such bills, notes, or securities, any indulgence, and to compound with him or them respectively, as the plaintiffs might think fit, without the same discharging or in any manner affecting the liability of the defendant, Mary Elizabeth, by virtue of the guarantee, or entitling her to set off or claim against the said sum of 400*l*. any dividends or payments which the plaintiffs might receive on account for the said Green." The declaration set out the guarantee, and averred the supply of goods to an amount exceeding the guarantee, of which sum 168*l*. and upwards was unpaid by Green, of which the defendants had notice, and were requested to pay the amount, but had not done so.

Assumpsit on a written guarantee given to the plaintiffs for goods to be supplied by them to one G. to the extent of 400*l*. The guarantee provided that the plaintiffs were to have full liberty to extend the period of credit to G., and to hold over or renew bills, notes, or other securities given by him, "and to grant to G. and the persons liable upon such bills, notes, or securities, any indulgence, and to compound with him or them respectively, as the plaintiffs might think fit, without the same discharging or in any manner affecting the liability of the defendant by virtue of the guarantee." The declaration then averred the supply of goods exceeding the guarantee, of which sum 168*l*. was unpaid by

The defendants pleaded, amongst other pleas, that after the debt was incurred by Green, and before the commencement of the suit, the plaintiffs became parties to a composition deed between Green and his creditors, whereby Green assigned to trustees all his stock in trade, goods, and other property mentioned in the deed, for the benefit of his creditors; and that in consideration thereof, the plaintiffs and

of which the defendant had notice, and was requested to pay that sum, but had not done so.

Plea, that after the debt was incurred by G., and before action brought, the plaintiffs became parties to a composition deed between G. and his creditors, whereby he assigned all his stock in trade, &c. for the benefit of his creditors; and that, in consideration thereof, the plaintiffs and the other creditors, parties thereto, granted a general release to G. of all debts and demands against him. The plea then averred, that this promise in the declaration was only made by the defendant as surety, and that the plaintiffs, by the deed, released G. without the privity of the defendant, and without notice.

Held, on demurrer, that under the express terms of the guarantee, the security was not discharged by the release of the principal debtor.

Each. of Pleas,
1838.

COWPER
v.
SMITH.

the other creditors, parties thereto, granted a general release to Green of all debts and demands against him: and the defendants averred in the plea, that the promise in the declaration mentioned was made by the wife (before marriage) as surety only; and that the plaintiffs, by the deed, released Green without the privity of the defendants or either of them, and without any notice to her.

The replication set out the terms of the guarantee (containing the above-mentioned clause, giving power to the plaintiffs to compound with Green) verbatim. To this replication the defendants demurred generally.

James, in support of the demurrer. — The defendants are discharged by the composition deed, and the release contained in it. The general rule is clear, that a release of the principal debtor without the surety's assent will discharge the surety: and it appears from the plea, that the plaintiffs executed the deed, and released Green, without the assent or even the knowledge of the surety in this case. In order to preserve the creditor's right of suing the surety, an express reservation to that effect ought to be contained, and, as none is shewn here, it must be taken that the deed contained none. [Lord *Abinger*, C. B.—By the express terms of the contract in this case, you agree to become bound notwithstanding the discharge of the principal debtor.] The principle on which the cases depend is, that a release of the debtor amounts to a release of the surety, because the surety, if sued, would be entitled to recover over against the principal, and the release would thereby become inoperative. In *Lewis v. Jones* (a), it was held that the holder of a promissory note, who had signed an agreement to take a composition of 5s. in the pound from the maker in full of his demand, on having the collateral security for that sum of a third person,

(a) 4 B. & C. 506.

thereby discharged an indorser, who had indorsed it for the maker's accommodation; the Court holding that the extinguishment of the debt put an end to the surety's liability. And in *Ex parte Glendinning* (a), the Lord Chancellor held that if a creditor wish to retain his right against the surety, there must be a reservation to that effect in the deed. The same doctrine is laid down in *Ex parte Gifford* (b). And Lord Eldon, in *English v. Darley* (c), observes, that when a creditor agrees to give time to the principal debtor, he can make no demand against the surety, because by so doing he must enforce a payment from the principal, contrary to the agreement. In the present case, therefore, as no express reservation appears to have been made of the right to sue the sureties, the remedy against them is gone. [Gurney, B.—The terms of the guarantee confer a right to release absolutely, and you insist upon a condition being imported into it. Parke, B.—There is no restriction in the guarantee, which authorises the plaintiffs to compound with Green, as they shall think fit, without the same discharging or affecting the liability of the surety.] But if the Court should think that the terms of guarantee rendered it unnecessary that the assent of the surety should be obtained to the composition deed, or that there should be an express reservation of the right to sue the sureties, it is still contended that the terms of the guarantee, giving liberty to compound, do not authorise an absolute release by a deed under seal.

Exch. of Pleas,
1838.

COWPER
v.
SMITH.

Hayes, contra, was stopped by the Court.

LORD ABINGER, C. B.—The deed in question is a composition deed, and is therefore within the express terms of the guarantee, which authorises the plaintiffs to “com-

(a) Buck, 517.

(b) 6 Ves. 809.

(c) 2 Bos. & Pul. 62.

Exch. of Pleas,
1838.

COWPER

v.
SMITH.

pound with" their debtor. Accordingly, as the surety has *expressly* contracted to remain liable, notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety.

The rest of the Court concurred.

Judgment for the plaintiff.

WOOD and Another, Assignees of GEORGE HAWORTH
and WILLIAM HAWORTH, Bankrupts, v. SMITH.

To a count for money had and received to the use of assignees of a bankrupt, the defendant pleaded that although the money mentioned remained and was in the possession of the defendant after the bankruptcy, yet that it was in fact received before the issuing of the fiat, and from thence remained in the defendant's possession: that before and at the time of the issuing of the fiat, the bankrupt was indebted to the defendant in a larger sum; and that, at the time he so gave credit to the bankrupt, he had no notice of any act of bankruptcy:—*Held*, that this was not a good ground for a set-off, (which the plea concluded with), and that it was therefore bad.

ASSUMPSIT.—The first count was for money had and received by the defendant to the use of the bankrupts before the bankruptcy; there were also counts for money had and received, and on an account stated, since the bankruptcy.

Pleas, first, non assumpsit; secondly, to the first and second counts, that although the sum of money in the second count mentioned, remained and was in the possession of the defendants after the said George Haworth and William Haworth became bankrupts, yet the same sum and every part thereof was in fact first received by the defendant before the said George Haworth and William Haworth, or either of them, became bankrupt, and before the issuing of any fiat in bankruptcy against them or either of them, to wit, on &c.; and from thence continually hitherto has remained and is in the possession of the defendant. And the defendant further says, that before and at the time of the date and issuing forth of the fiat in bankruptcy under and by virtue of which the said G. Haworth and W. Haworth were found and adjudged to be such bankrupts as aforesaid, to wit, on &c., the

was not a good ground for a set-off, (which the plea concluded with), and that it was therefore bad.

said G. Haworth and W. Haworth were and still are indebted to the defendant in 800*l.*, upon certain promissory notes theretofore made by them, that is to say, a certain promissory note theretofore, to wit, on the 8th day of April, 1835, made by the said G. Haworth and W. Haworth, and delivered to the defendant, whereby the said G. Haworth and W. Haworth promised to pay to the order of the defendant on demand the sum of 400*l.* value received; and a certain other promissory note theretofore, to wit, on the 2nd February, 1836, made by the said G. Haworth and W. Haworth, and delivered to the defendant, whereby the said G. and W. Haworth promised to pay to the order of the defendant or bearer on demand, the sum of 200*l.* value received; and a certain other promissory note theretofore, to wit, on the 20th day of March, in the year last aforesaid, made by the said G. Haworth and W. Haworth, and delivered to the defendant, whereby the said G. Haworth and W. Haworth promised to pay to the order of the defendant on demand the sum of 200*l.* value received; and which said sum of 800*l.*, so as aforesaid due to the defendant upon the said promissory notes, remains and is due and wholly unpaid to the defendant. And the defendant further says, that before and at the time of the date and issuing forth of the said fiat in bankruptcy, under and by virtue of which the said G. Haworth and W. Haworth were found and adjudged to be such bankrupts as aforesaid, to wit, on &c., the said G. Haworth and W. Haworth were and still are indebted to the defendant in 1000*l.*, for money before then lent by the defendant to the said G. Haworth and W. Haworth at their request, and for money before then by the defendant paid to the use of the said G. Haworth and W. Haworth, at their request, and for money found to be due from the said G. Haworth and W. Haworth on an account before then stated between them, which said last-mentioned sum was to be paid by the said G. Ha-

Esch. of Pleas,
1838.

Wood
v.
Smith.

Book of Pleas,
1838.

Wood
v.
Smith.

worth and W. Haworth to the defendant on request, but still remains due and unpaid to him. And the defendant further says, that when he gave credit to the said G. Haworth and W. Haworth in respect of the promissory note and last-mentioned sum of money, or any or either of them, or any part thereof in this plea respecting the aforesaid, he, the defendant, had not notice of any bankruptcy by the said G. Haworth and W. Haworth or either of them, committed. And the defendant further says, that the said sums of money, to wit, the sums of 800*l.* and 1000*l.* so due and unpaid to him, the defendant, as in the plea aforesaid, exceed any demand of the said G. Haworth and W. Haworth, or either of them, before their said bankruptcy, or of the plaintiffs as assignees as aforesaid since the said bankruptcy, in respect to the causes of action or either of them, or any part thereof, in the first and second counts of the declaration mentioned, whereof the plaintiffs before the commencement of the suit had notice, and out of which said sums so due and unpaid to the defendant as aforesaid, he, the defendant, is ready and willing and hereby offers to set off and allow the full amount of such demand.—Verification.

Special demurrer, assigning for causes, that the defendant is endeavouring to set off a debt due to himself from the said G. Haworth and W. Haworth, against a debt due from the defendant to the plaintiffs as assignees, on a contract with them as assignees: and that the plea neither confesses and avoids nor denies that the said sum in the said second count mentioned was received for the use of the plaintiffs as assignees as aforesaid.

Joinder in demurrer.

Cowling, in support of the demurrer. The plea is no answer to the second count; it admits money received and in possession of the defendant, to the use of the assignees; and the mere fact of the money having come into his

hands before the bankruptcy can be no answer; if it could, the law as to fraudulent preference would always be evaded. [*Parke, B.*—The defendant ought to have pleaded the general issue to the count for money received to the use of the assignees since the bankruptcy, and to the count for money received before the bankruptcy, the set-off.] In *Simpson v. Sikes* (a), the point in this case was expressly decided. [*Parke, B.*—*Poland v. Glyn* (b) is also in point.] Nothing is said as to the person from whom the defendant received the money, whether from either of the bankrupts or a stranger; nor to whose use it was then received. The defendant ought in some manner to have denied the receipt of the money to the use of the assignees, which by this plea he has admitted. [*Parke, B.*—If the plea is to be taken as a denial, it is bad. It may be good as a confession; but then there is no avoidance.] The Court then called on

Dec. of Pate,
1838.

Wood
v.
Smith.

Bramwell to support the plea.—The plea sufficiently confesses the original cause of action, but seeks to avoid it. [*Parke, B.*—It does not avoid it. If the money was received to the use of the assignees, then the defendant cannot be entitled to set off a debt due to him before the bankruptcy. The plea admits that the money was received before the bankruptcy, and has since remained in his possession, to the use of the assignees. Then there is no avoidance.] If it was received before, and remained in the defendant's hands after the bankruptcy, there would be no other mode of stating it. In *Groom v. Mealey* (c), *Tindal, C. J.*, says, “What is the import and meaning of the right in which the plaintiffs claim a sum as money received by the defendant for the use of the plaintiffs as assignees? *Prima facie*, these words import that the

(a) 6 M. & Selw. 295.

(b) 2 Dowl. & Ry. 310.

(c) 2 Bing. N. C. 140.

Exch. of Pleas,
1838.

WOOD
v.
SMITH.

money was received by the defendant after the bankruptcy; but it is also true that, under some circumstances, the plaintiffs might recover money received by the defendant before the bankruptcy, as money received to their use. If such were the case here, it had been easy for the defendant to have said that the sum for which the plaintiffs sue was received by him before the bankruptcy. As the plea is not so restricted, I think it is bad." Here this plea does aver that the money was received by the defendant before the bankruptcy (a). Suppose this defendant had authority to receive a sum of money for the bankrupts before the bankruptcy, and he did receive it after the bankruptcy, would he not have a right to set off a previous debt due to him against a claim for that sum in an action brought by the assignees? In *Hulme v. Muggleston* (b), a plea to an action by assignees for money had and received to their use since the bankruptcy stated that before the bankruptcy, and before any notice of the act of bankruptcy, the defendant gave credit to the bankrupt to the amount of 50*l.*, by indorsing for his accommodation and without consideration a bill of exchange for that amount, drawn by him, and payable to the bankrupt's order, and that such credit was of a nature extremely likely to end in a debt; and alleged that the bill was paid by the defendant on its dishonour after the bankruptcy, but before the commencement of the action, and that the bankrupt thereupon became indebted to the defendant; that before the bankruptcy, the bankrupt drew a bill on a certain bank, and delivered it to the defendant by way of loan, that he might raise the amount, and that he gave credit to the defendant for that amount;

(a) *Cowling* stated that he had authority from one of the gentlemen who argued the case of *Groom v. Mealey*, to say that the judgment of Lord C. J. *Tindal* was not cor-

rectly stated, on this point, in the report in *Bingham*. See the judgment more fully reported in 2 *Scott*, 171.

(b) 3 M. & W. 30.

And that afterwards; before the bankruptcy, the defendant obtained the amount of the bill from the bank on which the bill was drawn, and that he was ready and willing to set off the two sums against each other; and it was held, that the plea shewed such a giving of credit to the bankrupt, within the 6 Geo. 4, c. 16, s. 50, as might be the subject of a set-off to an action brought by his assignees. Perhaps it may be contended, that, from the mode of pleading, the defendant has informally denied that the money was received to the use of the assignees; but if so, the plea is only objectionable as amounting to the general issue, and that ground of demurrer is not taken.

Exch. of Pleas,
1838.

Wood
v.
Smith.

PARKE, B.—The plea confesses the action, but it does not sufficiently avoid it. It confesses that this was money received to the use of the assignees before the bankruptcy; therefore, if so, it must have been received by way of fraudulent preference, or in some other manner not to the use of G. & W. Haworth, and so as not to let in a set-off for a debt due from them (a). The plea is a good confession, but a bad avoidance.

Bramwell then obtained leave to amend, on payment of costs; otherwise

Judgment for the defendant.

(a) See other instances in *Simpson v. Sykes*, besides those of fraudulent preference.

PATRICK v. COLERICK.

TRESPASS for breaking and entering the plaintiff's close, and carrying away divers large quantities of straw.

To trespass qu. cl. fr., and carrying away divers large

quantities of straw, the defendant pleaded, 1st, not guilty; 2ndly, that the straw was not the property of the plaintiff; 3rdly, a justification to the whole cause of action: to which last plea the plaintiff demurred, but judgment was given on the demurrer for the defendant. At the trial, the jury found a verdict for the plaintiff on the 1st issue, with 1s. damages, and for the defendant on the 2nd, and the Judge did not certify under the 22 & 23 Car. 2, c. 139;—*Held*, that the plaintiff was entitled to no more costs than damages.

Exch. of Pleas,
1838.

PATRICK
v.
COLBRICK.

Pleas: 1st, not guilty; 2ndly, that the straw was not the property of the plaintiff; 3rdly, a plea which went to the whole cause of action, which had been demurred to, and on which judgment was given for the defendant (a). At the trial, the jury found for the plaintiff on the first issue, with one shilling damages, and for the defendant on the second issue, and the learned judge did not certify. The Master having, on taxation, refused to allow the plaintiff the costs of the first issue,

F. V. Lee obtained a rule to shew cause why the Master should not review his taxation, and allow the plaintiff the costs on the issue found for him: citing *Bird v. Higginson* (b) and *Hart v. Cutbush* (c).

Talfourd, Serjt., contra.—It has been repeatedly decided that under the plea of not guilty in trespass, the freehold or title may come in question (d); and unless it appears from the record that it did not come in question, the plaintiff is entitled to no more costs than damages, unless there be a judge's certificate under the 22 & 23 Car. 2, c. 139. The circumstance of there being a demurrer pending to another plea cannot make any difference, as the damages on the issues in fact are given contingently.

PARKE, B.—The freehold or title might come chiefly in question on this plea; and as the contrary does not appear, the plaintiff is not entitled to any more costs than damages. The application being in the nature of an appeal from the decision of the taxing officer, the rule must be discharged with costs.

Rule discharged.

(a) See 3 M. & W. 483.

(b) 5 Ad. & Ell. 83.

(c) 2 Harr. & Woll. 278.

(d) *Dunnage v. Kemble*, 3 Bing. N. C. 558, 4 Scott, 365; *Purnell v. Young*, 3 M. & W. 288;

Pugh v. Roberts, ib. 458. But since the rule of T. T. 1 Vict. (ante, p. 3) as to the mode of pleading the general issue "by statute," this seems to be otherwise.

Exch. of Pleas,
1838.

REX v. SHERIFF of MIDDLESEX.

IN this case, the defendant was arrested on the 16th of July, and gave a bailbond to the sheriff, who, on the 23rd, returned cepi corpus. On the 24th, (being the last day for putting in special bail), a judge's order was obtained for the sheriff to bring in the body, by forthwith putting in and perfecting special bail, which order would expire on the 28th. On the 25th, special bail by affidavit were put in, but they did not justify. An attachment having been obtained against the sheriff,

When a sheriff, eight days after an arrest, is called upon by a Judge's order forthwith to put in and perfect bail, he is bound to justify without notice of exception, such a case not being within the rule of T. T. 1 W. 4, s. 4.

Petersdorff now moved to set it aside for irregularity.

Erle shewed cause.—Putting in special bail by affidavit was not “putting in and perfecting special bail.” The eight days from the time of the arrest having elapsed, bail put in afterwards ought to have justified, though no notice of exception was given. The fourth rule of Trinity Term, 1 Will. 4, provides, that “if the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognisance of such bail may be taken out of Court, without other justification than such affidavit.” But that rule only applies to cases where bail is put in within the eight days; if the sheriff allows the eight days to elapse, the bail must justify without any exception. *Rex v. Wilson* (a) is expressly in point. There it was held that the abovementioned rule does not apply when the bail are put in, in that mode, after the regular time for putting in bail has expired, but that in such case the bail must actually justify as formerly. If the bail are out of time, then

(a) 3 Dowl. P. C. 255.

Exch. of Pleas, the plaintiff is relieved from the necessity of excepting
 1838. to the bail.

REX
 v.
 Sheriff of
 MIDDLESEX.

Petersdorff, contra.—This rule was obtained on the ground that the sheriff was not in contempt: the case cited only applies where he is in default. The sheriff could not be in default until the 28th; and here he put in bail on the 25th. The judge's order requires him forthwith to put in and perfect special bail. [*Parke*, B.—Yes, without any notice of exception.] The affidavit of sufficiency was in itself a compliance with the rule of Trinity Term, 1 Will. 4, and with the judge's order to put in and perfect bail.

LORD ABINGER, C. B.—The difficulty is, that by the order the sheriff is called upon to *perfect* bail. The Master reports, that it is the practice for the sheriff to put in and perfect bail without an exception, under circumstances like the present. We do not put it on the ground of the sheriff being in contempt, as he was not so until the 28th.

PARKE, B.—The fourth rule of Trinity Term, 1 Will. 4, applies to the ordinary cases of bail put in by the defendant, and not to the case of a sheriff bound by a judge's order to put in and perfect bail.

Rule discharged.

SAVAGE v. ASHWIN.

Where, on a reference of a cause to arbitration, the costs to abide the event, the arbitrator finds in favor of the

THIS cause was referred at Nisi Prius to a barrister, the costs to abide the event. The arbitrator awarded in favour of the plaintiff on part of the first and second issues, but *without damages*.

defendant upon a plea which covers the whole cause of action, it is no objection to the award that on other issues the arbitrator has found for the plaintiff without damages.

Petersdorff moved to set the award aside, on the ground that in this respect it was not final, since without any damages there could be no taxation of costs; and he compared it to the case of an award of a *stet processus*, which was always considered bad.

Exch. of Pleas,
1838.

SAVAGE
v.
ASHWIN.

The Court, however, on enquiry, ascertained that there was a plea on the record which covered the whole cause of action, and upon which the arbitrator had found in favour of the defendant; and they therefore held, that the arbitrator had done right in awarding no damages on those issues on which he found for the plaintiff (a).

Rule refused.

(a) See *Frankum v. Earl of Falmouth*, 2 Ad. & Ell. 452; 4 Nev. & Man. 330.

DOWLER v. COLLIS.

ASSUMPSIT for goods sold and delivered. Pleas, non-assumpsit, and payment. After plea pleaded, but before issue joined, a rule was obtained on the part of the defendant, to change the venue on special grounds. The affidavit in support of the motion stated that the action was commenced before the period of credit for which the goods were sold had expired; but that the credit having since expired, he had tendered to the plaintiff, and the plaintiff had accepted, the price of the goods.

Although the general rule is that a motion to change the venue on special grounds cannot be made until after issue joined, yet if the pleadings and facts of the case are such that the Court cannot fail to see what the issues joined must be, the application may be granted before issue joined.

Hayes shewed cause.—The application is premature. It is laid down in all the cases, that a motion to change the venue on special grounds cannot be made until after issue joined, since until then the Court cannot see what may be

Esch. of Pleas,
1838.

DOWLER
v.
COLLIER.

the question in dispute at the trial, and whether the special grounds assigned for changing the venue may apply.—He referred to Archbold's Practice of Country Attorneys, p. 233.

Archbold, contra.—The general rule is not applicable in such a case as the present, where the Court are in a situation to see what must necessarily be the issues joined. Nothing remains for the plaintiff to do but to add the similiter to the first plea, and to traverse the fact of payment alleged in the second.

PER CURIAM.—The general rule, no doubt, is as has been stated; but here the Court cannot fail to see what the issues, as ultimately joined, must necessarily be. It is plain the only contest now between the parties is as to the costs. We think, therefore, under the circumstances, that the application is not premature.

Rule absolute.

CLARKSON and Another, Assignees, v. PARKER.

The Court has a general jurisdiction, independently of the stat. 3 Geo. 2, c. 23, s. 23, to order an attorney to deliver a bill of costs to his client, and account for monies received; although they have no power to order it to be taxed, except in the cases provided for by that act.

HUMFREY had obtained a rule calling on the plaintiffs to shew cause why the following order of *Alderson, B.*, which had been obtained on the application of the assignees of a bankrupt, should not be rescinded, on the ground that the learned judge had no authority to make such order:—"I order that Mr. Archer, the defendant's late attorney, within three weeks, do deliver to the attorney for the assignees his bill of costs in this and other actions, including those of a judgment obtained against B. C.; the said bill to be referred to the Master to be taxed, the attorney of the assignees undertaking to pay him a rateable

end of the money due to him, if any, and reserving
 a any lien to which he may be entitled; the said Mr.
 er to give credit for all sums of money received by him
 half of the bankrupt," &c. It was admitted that the
 ess done was not of a nature to give the Court jurisdic-
 tion under stat. 2 Geo. 2, c. 23, s. 23.

Each. of Pleas,
 1838.

CLARKSON
 v.
 PARKER.

money shewed cause.—It must be admitted that that
 of the order which relates to the taxation of the bill
 it be supported; but it is submitted that the Court
 Judge had power to make such an order, as to
 rest of the terms contained in it. If he has received
 money into his hands, the Court must undoubtedly
 jurisdiction over him, as an officer of the Court, to
 compel him to account for it. And the terms of the order
 in his favour; for, by being allowed to retain his lien,
 placed in a situation preferable to that of any other
 creditor under the bankruptcy.

Winfrey, contra.—The Court or a Judge has no power
 to order an attorney to deliver his bill of costs, except in
 the cases which are provided for by 2 Geo. 2, c. 23,
 namely, where it relates to the costs of an action
 at law or a suit in equity. [*Parke*, B.—The case of *Ex*
parte Aitkin (a) is expressly in point. There the Court of
 King's Bench decided, that "where the employment of
 an attorney is so connected with his professional charac-
 ter as to afford a presumption that his character formed
 the ground of his employment by the client, there the Court
 exercise jurisdiction:" and I am not aware that that
 has ever been overruled. *Alderson*, B.—And in *Ex*
parte Arrowsmith (b), Lord *Eldon* said, that "the jurisdic-
 tion to tax the bills of attornies and solicitors, as offi-

(a) 4 B. & Ald. 47.

(b) 13 Ves. 125.

Exch. of Pleas,
1838.

CLARKSON

v.

PARKER.

cers of the Court, subsisted long before the statute.”] Those cases were determined at a time when it was thought that, independently of the provisions of the stat. 2 Geo. 2, c. 23, the Courts had a power to refer an attorney’s bill for taxation. Thus, in *Wilson v. Gutheridge* (a), it was held that the Court would order an attorney’s bill to be taxed, though it consisted merely of a charge for drawing a warrant of attorney, and attending the defendant respecting it: and the Court said, “We have a paramount jurisdiction, independently of the statute, to refer an attorney’s bill for taxation.” But it has been clearly settled by subsequent decisions, that the Courts have no power to order an attorney’s bill to be taxed, unless it be for a proceeding at law or in equity: *Clutterbuck v. Combes* (b), *Burton v. Chatterton* (c). So that the former authorities, which decided that the Courts had power to compel an attorney to deliver a bill, were founded on the idea that they had power to order a bill to be taxed, which it appears, by the subsequent cases, they had not.

PARKE, B.—There have been instances innumerable in which orders have been made for an attorney’s bill to be delivered, without any thing more being said. I do not see why any restriction should be placed upon the authority of a Judge to order the attorney to deliver his bill, in order to let his client know how much he is in his debt. When once in possession of a signed bill, it would be in the discretion of the party whether he would afterwards apply to the Court to have it taxed, undertaking to pay the amount found to be due; and the question might then arise whether it ought to be taxed or not:—but I have no doubt as to the right of the client to insist on his attorney’s letting him know what is

(a) 3 B. & Cr. 157.

(b) 5 B. & Ad. 401.

(c) 3 B. & Ald. 486.

Due to him. The rule must therefore be absolute so far as relates to striking out that part of the order which speaks of the taxation of the bill and the undertaking to pay the same by the assignees, but discharged as to the rest.

Exch. of Pleas,
1838.

CLARKSON
v.
PARKER.

ALDERSON, B.—The object of the statute 2 Geo. 2, c. 23, was to restrain the right of the attorney in proceeding against his client; for, previous to that act, he had always a right to have the reasonableness of his bill determined by a jury; whereas now, before bringing an action, it must be delivered, and thus become liable to taxation. But that statute is quite independent of the general power of the Court to compel him, under proper circumstances, to deliver a bill, and there are numerous cases to which the statute has no reference at all.

GURNEY, B., concurred.

Rule discharged, except so far as related to the taxation of the bill, and the undertaking to pay by the assignees.

BADNALL v. HAYLAY.

THE plaintiff, at the commencement of the action, being resident out of the jurisdiction of the Court, the defendant had applied for and obtained the usual bond as a security for costs.

Whateley now moved for a rule to shew cause why the bond should not be delivered up to be cancelled, on the ground that the plaintiff had since then come to reside in

When security for costs has been given by a plaintiff residing out of the jurisdiction, the Court will not order the bond up to be cancelled before the end of the suit, on the alleged ground that the

plaintiff has since returned to England, with the intention of permanently remaining.

Exch. of Pleas,
1838.

BADNALL
v.
HAYLAY.

England. The affidavit stated that the plaintiff had returned to England with the intention of permanently remaining here.

PARKE, B.—There is no precedent for such a rule. I think that the bond must remain during the continuance of the suit, otherwise any casual visit to this country within that period, will be converted into a residence here.

ALDERSON, B.—Intermediate costs may have been incurred, for which this bond is and ought to remain a security. This will also prevent the inconvenience of a second application for security hereafter, should the plaintiff go abroad again before the action is terminated.

Rule refused.

HODSOLL v. WISE.

A cause was referred at Nisi Prius, by an order of reference which stated, "that the witnesses should be examined upon oath, to be taken before me" (the Judge of Assize,) "or some other Judge of the Court of Exchequer, or before a commissioner appointed to take affidavits in the same Court:"—*Held*, that this clause did not exclude the general power of the arbitrator to administer an oath to such witnesses, under 3 & 4 Will. 4, c. 42, s. 41.

THIS cause was referred at Nisi Prius to a barrister; and it was directed, by the order of reference, that "the parties to the suit (if the arbitrator should think fit) and their respective witnesses should be examined upon oath, to be taken before me," (the Judge at Nisi Prius), or some other Judge of the court of exchequer, or before a commissioner appointed to take affidavits in the said Court." An objection was made, before the arbitrator, that this clause took away his power of swearing the witnesses; but he being of a contrary opinion, overruled the objection, and administered the oath to them. *Warren* had on a former day obtained a rule to shew cause why the certificate of the arbitrator should not be set aside on the ground that the arbitrator had acted improperly and without authority in swearing the witnesses.

Humfrey shewed cause.—The statute 3 & 4 Will. 4, c. 42, s. 41, empowers every arbitrator to whom a cause is referred, to swear the witnesses: it enacts that “where in any order of reference it shall be agreed that the witnesses on such reference shall be examined on oath, it shall be lawful for the arbitrator, and he is hereby authorized and required, to administer an oath to such witnesses,” &c. It may be somewhat doubtful, whether any parties have power, by private agreement, to take away the operation of this statute; but if they have, the agreement for that purpose should be framed in much clearer terms than the present, and shew beyond all doubt that such was the meaning of the parties. The terms of the order of reference, if it is to be construed so extensively, would take away the power of swearing the witnesses, not only from the arbitrator, but from any Judge in Westminster Hall, if he did not belong to the Court of Exchequer, which it is scarcely possible either the parties or the Judge at *Nisi Prius* could ever have intended.

Exch. of Pleas,
1838.

HODSOLL
v.
WISE.

Warren, contra.—It is clear that the order of reference is based upon the agreement between the parties, and there cannot be a doubt that they had a right to waive the operation of the statute; and here they have agreed that the reference shall not be conducted according to the provisions of the act, but in the mode expressed in the order. The arbitrator must strictly follow the power conferred upon him; but here he has taken upon himself a power which the parties did not give him.

PARKE, B.—This case does not come before the Court without consideration, as we considered it at the time the rule was granted, and I think it would have been better had the rule been refused in the first instance. The act provides, that if it be agreed in the submission that the witnesses shall be examined on oath, the arbitrator shall

Exch. of Pleas,
1838.

HODSOLL

v.
WISE.

have power to administer it. Here the submission does contain such a clause, and the question is, do the additional words limit the power of the arbitrator in this respect, or are they merely cumulative? If the word "only" had been inserted, and the submission had provided that the witnesses were to be sworn before a Judge or a commissioner *only*, that might have had the effect of taking away the arbitrator's power to do so: but it would have been highly improper to have inserted such a clause, and I do not think that any Judge at Nisi Prius would sanction such a proceeding; indeed, even the present condition is improper, and one which ought not to have been introduced. However, as it has been introduced, we are bound to put a construction upon it; and we think that these words are altogether cumulative, and not restraining; and that the effect of them is to give an additional power to that which the act gives, without divesting the arbitrator of his general authority under it. This rule must therefore be discharged with costs.

ALDERSON, B. and GURNEY, B., concurred.

Rule discharged with costs.

WALLIS *v.* HARRISON and Others.

A parol license from A. to B. to enjoy an easement over A.'s land, is countermandable at any time whilst it

CASE by the plaintiff, as reversioner, for damage done to a close in the possession of his tenant, by digging up the soil, and making embankments and a railway over it.

remains executory; and if A. conveys the land to another, the license is determined at once, without notice to B. of the transfer, and B. is liable in trespass if he afterwards enters upon the land.

When the profert of a deed is requisite, it is not sufficient to allege as an excuse, "that the deed was delivered to the opposite party."

The defendants pleaded six pleas. In the second plea they justified under an indenture, bearing date the 26th of October, 1833, whereby the Dean and Chapter of the Cathedral Church of Durham, being seised in fee of certain lands, of which the close in question was parcel, granted and demised, and certain other parties therein mentioned granted, ratified, and confirmed unto the defendants, full liberty to enter on the said lands, and make a main-way, a bye-way, and certain cuts for the carriage of merchandize across the same, for the term of twenty-one years, at the rent of 60*l.* per annum. On this plea issue was joined. The defendants also pleaded, fifthly, that before the time when, &c., and before the said close became the close of the plaintiff, to wit, on the 1st of January, 1831, the defendants applied to the said Dean and Chapter, and other parties to the indenture in the 2nd plea mentioned, for license to make over the said close in the indenture mentioned, in which &c., the said road, &c., and the said Dean and Chapter being then seised in their demesne as of fee in the premises, it was agreed between the defendants and the said Dean and Chapter and the other parties, &c., that the defendants should have such license, liberty, power, and authority to enter into and upon the said close, and to form, make, and maintain a certain main road and byeways and cuts, &c., and that the said Dean and Chapter, and the said other parties, should grant, ratify, and confirm the same to the defendants; and thereupon, and long before the plaintiff or any person whose estate or interest he now hath, had any estate or interest in the said close in which &c., to wit, on the 1st January, 1831, the said Dean and Chapter, and the said other parties, gave and delivered to the defendants at their request possession and occupancy of the said way-leave, &c., over which the said main road and byeway and cuts &c., now are and at the said time when &c., had been constructed, for the purpose of making the same, with

Exch. of Pleas,
1838.

WALLIS
v.
HARRISON.

Exch. of Pleas,
1838.

WALLIS
v.
HARRISON.

leave, license, and authority to the defendants to enter and set out the same &c.; whereupon the defendants, before the plaintiff had any interest in the close, entered and set out the same, and made the said main way &c., for the purpose of making the said road, &c.; and the defendants further say, that afterwards, in pursuance of the said agreement, and of the said possession so given, to wit, on the 26th of October, 1833, by an indenture made between &c., the said Dean and Chapter granted and demised, and granted and ratified and confirmed, unto the defendants such full and free liberty, power and authority, to enter upon the said close, and to form, make, and maintain the said road, &c., and maintain the said possession, &c. The plea then proceeded to aver that the defendants, by virtue of the said possession, authority, license, and indenture last aforesaid, possessed and enjoyed the said way-leave, and entered on the premises for the purpose of forming the said main road, and formed and continued the said main road until the time when &c., and for that purpose, and in so doing, unavoidably committed the said trespasses, &c. The 6th plea was, that the railway in question had formerly been the joint property of the defendants and the plaintiff, and that by indenture bearing date the 16th of July, 1832, made between the defendants and the plaintiff, (*which said indenture, sealed with the seals of the plaintiff and defendants, the defendants were unable to bring into Court, the same having been delivered to the plaintiff*), the plaintiff had disposed of all his interest in the said railway.

The plaintiff having craved oyer of the indenture in the 5th plea mentioned, set out the deed, and then demurred specially to that plea, on several grounds; and also demurred to the sixth on this ground (amongst others), that the excuse given in it for not making profert of the indenture of the 16th of July, 1832, was insufficient in law. Joinder in demurrer.

W. H. Watson, in support of the demurrer.—'The excuse given in the sixth plea is not sufficient to dispense with the profert. If the party, in pleading a deed, states it to be in the possession of the opposite party, as in a writ of dower, if the tenant alleges a detinue of charters by the demandant, or where a man claims by statute merchant or statute staple, profert will be dispensed with; *Wymark's case* (a); or even if it be averred that the instrument was lost by time or accident: *Read v. Brookman* (b): but here it is only alleged that the deed was delivered to the plaintiff, without stating that it is now in his possession, or what has become of it. [*Parke, B.*—The excuse for the want of profert is clearly insufficient.] Then the fifth plea is bad for several reasons; first, because the right of making this main road was a matter which lay in grant, and could only be conferred by deed, and not by parol; and the deed mentioned in the plea, as it appears on oyer, does not amount to a confirmation of any prior license by deed. Then, on another ground, it is a principle that every deed must be pleaded according to its legal effect and operation; now, this deed is pleaded as a grant and also as a confirmation, either of which would be a sufficient answer of itself; so that the plea is double and uncertain, and is bad on that ground also.

Exch. of Pleas,
1838.

WALLIS
v.
HARRISON.

Hoggins, contra.—It must be admitted that the sixth plea cannot be supported. But the fifth plea is good, as shewing a license from a former owner of the close, which continues in force until notice is given of its revocation. Admitting that that license was countermandable by a subsequent conveyance of the close to the plaintiff, it is not competent to him to treat the defendants as trespassers, without first giving them notice of the conveyance, by the effect of

(a) 5 Rep. 75, a.

(b) 3 T. R. 151.

Exch. of Pleas,
1838.

WALLIS
v.
HARRISON.

which their title to the easement is taken away, and to which they were neither parties nor privies. *Webb v. Paternoster* (a) is an authority to that effect. There the owner of a close had given a party a license to place a cock of hay upon it, until he should be able conveniently to sell it. The owner of the close subsequently leased it to the defendant for a term of years, who put in some cattle which eat the hay, for which trespass was brought. It was held by *Montague, C. J.*, and *Haughton, J.*, *Doderidge, J.*, being of a contrary opinion, that the plaintiff, under such circumstances, was entitled to notice. If that be so, it was incumbent on the plaintiff to shew that the defendants had had notice, and it was not for them to shew that they had not. It is clear that the dean and chapter could not have maintained trespass against the defendants without notice; and it is difficult to see how any person who claims under them can be in a better situation.

Watson, in reply.—*Webb v. Paternoster* is distinguishable from the present case, as that was the case of a license executed: here it is wholly executory. In *Winter v. Brockwell* (b), that distinction was taken, and it was there held that a license to put a skylight over an area could not be recalled at pleasure after it had been executed by the grantee. *Hewlins v. Shippam* (c) is an authority to the same effect. It would be absurd to hold that notice should be required; the party in the enjoyment of an easement is bound to take notice who is the owner of the inheritance.

LORD ABINGER, C. B.—I am of opinion that the plea is bad on special and on general demurrer. It is an attempt

(a) Palm. 71; Popham, 151; 2 Rol. R. 143.

(b) 8 East, 308.

(c) 5 B. & C. 221; 7 D. & R. 783.

to shew a species of title, or to set up an excuse under colour of a deed, the precise operation of which is not sufficiently shewn. If the deed had been executed before the plaintiff had any interest in the property, or had entered on the soil, it would have operated as a good defence as pleaded; because it is pleaded as a confirmation of a parol authority to make the rail-road, which had been given before the plaintiff had any interest in the close, and which would then have remained in force notwithstanding the change of property. But the plea does not shew, with any distinctness, whether the deed was executed before or after the plaintiff's interest in the locus in quo, and for that uncertainty is bad. Then, treating it as a plea of license, I think it is bad on general demurrer, because a mere parol license to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed, that if a man out of kindness to a neighbour allows him to pass over his land, the transferee of that land is bound to do so likewise. But it is said, that the defendant should have had notice of the transfer. That is new law to me. A person is bound to know who is the owner of the land upon which he does that which, *primâ facie*, is a trespass. Even if this were not so, I think the defendants ought, in excuse of their trespass, to have pleaded the fact that they had no notice of the transfer. It is true, it would be the assertion of a negative, but I think this would be one of those cases where, to make a title or excuse good, a negative should be shewn on the pleadings, even if the proof of the affirmative might be on the opposite party. As to the case of *Webb v. Paternoster*, the grant of the license to put the hay stack on the premises was in fact a grant of the occupation by the haystack, and the party might be considered

Exch. of Pleas,
1888.

WALLIS
HARRISON.

Exch. of Pleas,
1838.

WALLIS
v.
HARRISON.

in possession of that part of the land which the haystack occupied, and that might be granted by parol.

PARKE, B.—I am of the same opinion. If the justification is made to rest on a supposed grant from the Dean and Chapter, I think the plea is bad, because it does not state that the deed was executed before the plaintiff became entitled. Then, with regard to the license, the plea is bad in substance. We are not called upon in this case to consider, whether a license to create or make a railroad, granted by a former owner of the soil, is countermandable after expense has been incurred by the licensee, which was the question in *Winter v. Brockwell*; for it is not alleged that there has been any expense incurred in consequence of the license, and therefore it remains executory: and I take it to be clear, that a parol executory license is countermandable at any time; and if the owner of land grants to another a license to go over or do any act upon his close, and then conveys away that close, there is an end to the license; for it is an authority only with respect to the soil of the grantor, and if the close ceases to be his soil, the authority is instantly gone. *Webb v. Paternoster* is very distinguishable from this case, for there the license was executed, by putting the stack of hay on the land; the plaintiffs there had a sort of interest, against the licensor and his assigns; but a license executory is a simple authority excusing trespasses on the close of the grantor, as long as it is his, and the license is uncountermanded, but ceases the moment the property passes to another.

GURNEY, B., concurred.

Judgment for the plaintiff.

MEMORANDUM.

urday the 8th of December, died the Honourable
as Allan Park, Knt., one of the Judges of the
Common Pleas since Michaelmas vacation, 1815.
succeeded by The Right Honourable *Thomas*
Chief Judge of the Court of Bankruptcy, who
d to the degree of the coif, and gave rings with
o *Judicium parium*. He took his seat on the
of Hilary Term.

END OF MICHAELMAS TERM.

REPORTS OF CASES
ARGUED AND DETERMINED
IN
The Courts of Exchequer,
AND
Exchequer Chamber.

HILARY TERM, 2 VICTORIÆ.

REGULA GENERALIS.

*Forms of Writs as framed by the Judges, pursuant
to the Statute 1 & 2 Vict. c. 110.*

HILARY VACATION, 2 VICT.

*Exch. of Pleas,
1839.*

IT IS ORDERED, That the following forms of writs framed by the Judges pursuant to the statute 1 & 2 Vict. c. 110, s. 20, be used from and after the first day of March next, with such alterations as the nature of the action, the description of the Court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary, but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

No. 1.

Writ of elegit
upon a judgment in the

Victoria, by the Grace of God, of the United Kingdom
of Great Britain and Ireland, Queen, Defender of the

Faith, to the Sheriff of ——— greeting. Whereas A. B., lately in our Court before us at Westminster, by the judgment of the same Court, recovered against C. D. ———l., which, in our said Court before us, were adjudged to the said A. B., for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings then lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and afterwards the said A. B. came into our said Court before us, and, according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the C. D., or any person in trust for him, was seised or possessed of on the ——— day of ———, in the year of our Lord ——— (a), on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D. on the said ——— day of ——— (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the damages aforesaid, together with interest upon the said sum of ———l., at the rate of four pounds per centum per annum, from the ——— day of ———, in the year of our

Exch. of Pleas,
1839.

Court of
Queen's Bench
in an action of
assumpsit.

(a) The day on which judgment was entered up.

Exch. of Pleas,
1839.

Lord — (a), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of — (b), or at any time afterwards, or over which the said C. D. on the said — day of — (b), or at any time afterwards, had any disposing power, which he might without the assent of any other person exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have here then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

—◆—
No. 2.

Writ of elegit
on a rule made
in the Court

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the

(a) The day on which the judgment was entered up; or, in case the judgment was entered up prior to the 1st of October, 1838, say,

from the 1st day of October, in the year of our Lord, 1838.

(b) The day on which the judgment was entered up.

Faith, to the sheriff of — greeting. Whereas, lately in our Court before us at Westminster, by a rule of the said Court, intituled, &c. [*as the case may be*], the sum of —*l.* was by the said Court ordered to be paid by C. D. to A. B., and afterwards the said A. B. came into our said Court before us, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person in trust for him, was seised or possessed of on the — day of —, in the year of our Lord — (*a*), on which day the said rule was made, or at any time afterwards, or over which the said C. D. on the said — day of — (*a*), or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of —*l.*, together with interest upon the said sum of —*l.*, at the rate of four pounds per centum per annum, from the said — day of —, in the year of our Lord — (*b*), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments,

Exch. of Pleas,
1839.

of Queen's
Bench for pay-
ment of money.

(*a*) The day on which the rule was made.

prior to the 1st of October, 1838, say, from the 1st day of October, in the year of our Lord 1838.

(*b*) The day on which the rule was made, or, in case it was made

Exch. of Pleas,
1839.

including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person in trust for him was seised or possessed of on the said — day of — (a), or at any time afterwards, or over which the said C. D. on the said — day of — (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of — £., together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

—◆—
No. 3.

Writ of elegit
on a rule made
in the Court of
Queen's Bench
for payment of
money and
costs.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the sheriff of — greeting. Whereas, lately in our court before us at Westminster, by a rule of the said court, intituled, &c. [*as the case may be*] the sum of — £. was, by the said court, ordered to be paid by C. D. to A. B., together with the costs of the said rule, which said costs were afterwards, on the — day of —, taxed and allowed by our said Court at the sum of — £. And afterwards the said A. B. came into our said Court before us, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods

(a) The day on which the rule was made.

Exch. of Pleas,
1839.

and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the — day of — in the year of our Lord — (a), or at any time afterwards, or over which the said C. D., on the said — day of — (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of —£. and —£., together with interest upon the said two several sums of —£. and —£., at the rate of four pounds per centum per annum, from the said — day of — (b), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of — (c), or at any time afterwards, or over which the said C. D., on the said — day of — (c), or at any time afterwards had any disposing power which

(a) The day on which the costs of the rule were taxed.

(b) The day on which the costs of the rule were taxed, or, in case that day were prior to the 1st of

October, 1838, say, “from the 1st of October, in the year of our Lord 1838.”

(c) The day on which the costs of the rule were taxed.

Exch. of Pleas,
1839.

he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of ——*l.* and ——*l.*, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the —— day of —— in the year of our Lord ——.

—◆—
No. 4.

Writ of elegit on a judgment of an inferior Court, in an action of assumpsit removed into the Court of Queen's Bench.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the sheriff of ——, greeting. Whereas A. B., lately in [*insert the style of the court*], by the judgment of the said Court, recovered against C. D. the sum of ——*l.*, which, in the said Court, were adjudged to the said A. B., for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings, then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record. And whereas the said judgment was afterwards, on the —— day of —— in the year of our Lord ——, removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster [*or of ——, one of the justices of our said Court before us at Westminster, as the case may be*], in pursuance of the statute in that case made

Ecch. of Pleas,
1839.

and provided, and the costs attendant upon the application for the said order and upon the said removal were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by our said Court before us at Westminster, at the sum of —*l.* And afterwards the said A. B. came into our said Court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D. or any person in trust for him, was seised or possessed of on the said — day of — in the year of our Lord — aforesaid (a), or at any time afterwards, or over which the said C. D., on the said — day of — (a), or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid and the said costs so taxed and allowed by our said Court before us at Westminster as aforesaid, together with interest upon the said two several sums of —*l.* and —*l.*, at the rate of four pounds per centum per annum, from the — day of — aforesaid (a), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents,

(a) The day on which the costs of removing the judgment were taxed.

Exch. of Pleas,
1839.

and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said — day of — (a), or at any time afterwards, or over which the said C. D., on the said — day of — (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, and the said costs so taxed and allowed by our said Court before us at Westminster as aforesaid, and interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.



No. 5.

Writ of elegit
on an order for
payment of
money made
in an inferior
Court, and re-
moved into the
Court of
Queen's Bench.

Victoria, &c. to the Sheriff of —, greeting. Whereas lately in [*insert the style of the Court*], by a rule of the said Court intituled, &c. [*as the case may be*] the sum of —£. were by the said Court ordered to be paid by C. D. to A. B., and whereas the said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster [*or of*

(a) The day on which the costs of removing the judgment were taxed.

*of the justices of our said Court before us at
ster, as the case may be], in pursuance of the* *Exch. of Pleas,
1839.*
in that case made and provided, and the costs
t upon the application for the said last-mentioned
nd upon the said removal, were afterwards, on
day of —, in the year of our Lord —, taxed
ved in our said Court before us at Westminster at
of —, and afterwards the said A. B. came into
Court before us at Westminster, and, according to
of the statute in such case made and provided, chose
livered to him all the goods and chattels of the said
your bailiwick, except his oxen and beasts of the
and also all such lands, tenements, rectories, tithes,
nd hereditaments, including lands and heredita-
copyhold or customary tenure, in your bailiwick,
id C. D. or any person in trust for him, was seised
sed of, on the said — day of —, in the year
ord — (a), or at any time afterwards, over
e said C. D. on the said — day of — (a), or
ime afterwards, had any disposing power which
t, without the assent of any other person exercise
own benefit, to hold to him the said goods and
as his proper goods and chattels, and to hold the
ls, tenements, rectories, tithes, rents, and here-
s respectively, according to the nature and tenure
to him and to his assigns, until the said two
sums of —l. and —l., together with interest
aid two several sums of —l. and —l., at the
our pounds per centum per annum, from the said
y of — (a), shall have been levied. Therefore
mand you, that without delay you cause to be
l to the said A. B., by a reasonable price and
all the goods and chattels of the said C. D. in your

day on which the costs ferior Court into the Court of
ng the rule of the in- Queen's Bench were taxed.

Exch. of Pleas,
1839.

bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any one in trust for him, was seised or possessed of on the said — day of — (a), or at any time afterwards, or over which the said C. D. on the — day of — (a), or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of — £ and — £., together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

—◆—
No. 6.

Writ of elegit
on a rule for
payment of
money and
costs, made in
an inferior
Court and re-
moved into
Queen's Bench.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. Whereas lately in [*insert the style of the Court*], by a rule of the said Court, intituled, &c., [*as the case may be*], the sum of — £. was by the said Court ordered to be paid by C. D. to A. B., together with the costs of the said rule, which said costs were afterwards, on the — day of —, in

(a) The day on which the costs of removing the rule of the inferior Court into the Court of Queen's Bench were taxed.

Exch. of Pleas,
1839.

the year of our Lord —, taxed and allowed by the said Court at the sum of —l., and whereas the said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster, [*or of —, one of the justices of our said Court, before us at Westminster, as the case may be*], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal, were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed in our said Court before us at the sum of —l., and afterwards the said A. B. came into our said Court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of — (a), or at any time afterwards, or over which the said C. D. on the said — day of — (a), or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of —l., and —l., and —l., together with interest upon the said three several sums of —l., and —l., and —l., at the rate of

(a) The day on which the costs of removing the rule of the inferior Court into the Court of Queen's Bench were taxed.

Exch. of Pleas,
1839.

four pounds per centum per annum, from the said — day of — (a), shall have been levied. Therefore, we command you, that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person in trust for him was seised or possessed of on the said — day of — (a), or at any time afterwards, or over which the said C. D., on the said — day of — (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit to hold the said goods and chattels to the said A. B., as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of —l., and —l., and —l., together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

—◆—
No. 7.

Writ of fieri
facias on a judgment in the

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the

(a) The day on which the costs of removing the rule of the inferior Court into the Court of Queen's Bench were taxed.

, to the Sheriff of —, greeting. We command that of the goods and chattels of C. D. in your baili- you cause to be made —£., which A. B. lately in our court, before us at Westminster, recovered against or his damages which he had sustained, as well on account of the not performing certain promises and undertakings, then lately made by the said C. D. to the said A. B. as for his costs and charges by him about this suit at his behalf expended, whereof the said C. D. is convicted, as appears to us of record, together with interest on the said sum of —£., at the rate of four pounds per annum, from the — day of —, in the 10th year of our Lord — (a), on which day the judgment aforesaid was entered up, and have that money with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages and interest as aforesaid, and you do all such things as, by the statute passed in the 1st year of our reign, you are authorized and required to do in this behalf. And in what manner you shall have caused this our writ, make appear to us at Westminster, immediately after the execution thereof, and have there certified this our writ.

Witness, Thomas Lord Denman, at Westminster, on the 10th day of —, in the year of our Lord —.



No. 8.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command that of the goods and chattels of C. D. in your baili- you cause to be made —£., which lately in our

The day on which the judgment was entered up; or, if entered up prior to the 1st of October 1838, say, “from the 1st day

of October, in the year of our Lord 1838,” omitting the words, “on which day the judgment aforesaid was entered up.”

Exch. of Pleas,
1839.

Court of
Queen's Bench,
in an action of
assumpsit.

Writ of fieri
facias on an
order of the
Court of
Queen's Bench
for payment of
money.

Exch. of Pleas,
1839.

Court, before us at Westminster, by a rule of our said Court, intituled, &c. [*as the case may be*] were by the said Court ordered to be paid by the said C. D. to A. B., and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of —£., at the rate of four pounds per centum per annum, from the — day of —, in the year of our Lord — (a), on which day the said rule was made, and have that money, together with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said sum of money so ordered to be paid by the said C. D. to the said A. B. and for interest as aforesaid, and that you do all such things as, by the statute passed in the second year of our reign, you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

—◆—
No. 9.

Writ of fieri
facias on an
order of the
Court of
Queen's Bench
for payment of
money and
costs.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you, that of the goods and chattels of C. D. in your bailiwick, you cause to be made —£., which lately in our Court before us at Westminster, by a rule of our said Court, intituled, &c. [*as the case may be*] were by the said Court ordered to be paid by the said C. D. to A. B., together with the costs of the said rule, which said costs were

(a) The day on which the rule was made; or, if it were made prior to the 1st of October, 1838, say, "from the 1st day of October,

in the year of our Lord 1838," omitting the words, "on which day the said rule was made."

afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by our said Court at the sum of —*l.*, and that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made interest upon the said two several sums of —*l.* and —*l.*, at the rate of four pounds per centum per annum, from the said — day of —, in the year of our Lord — (a), and have that money, together with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said sum of money so ordered to be paid by the said C. D. to the said A. B. and for costs and interest as aforesaid, and that you do all such things as, by the statute passed in the second year of our reign, you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Exch. of Pleas,
1839.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

—◆—
No. 10.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you, that of the goods and chattels of C. D. in your bailiwick, you cause to be made —*l.*, which A. B. lately in [*insert the style of the Court*], by the judgment of the said Court, recovered against the said C. D. for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs

Writ of fieri facias on a judgment of an inferior Court in an action of assumpsit, removed into the Court of Queen's Bench.

(a) The day on which the costs of the rule were taxed; or, if that were prior to the 1st of October,

1838, say, "from the 1st day of October, in the year of our Lord 1838."

Exch. of Pleas,
1839.

and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and which judgment was afterwards, on the — day of —, in the year of our Lord —, removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster, [*or of —, one of the justices of our said Court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said order, and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said Court before us at Westminster at the sum of —*l.* And we further command you, that of the said goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of —*l.* (*a*), together with interest on the said two several sums of —*l.* and —*l.*, at the rate of four pounds per centum per annum, from the said — day of —, in the year of our Lord — (*b*); and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages aforesaid, and for costs and interest as aforesaid; and that you do all such things as, by the statute passed in the second year of our reign, you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

(*a*) The costs attendant upon the removal of the judgment out of the inferior Court into the Court of Queen's Bench.

(*b*) The day on which the costs of removal were taxed.

No. 11.

Exch. of Pleas,
1839.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, we command you, that of the goods and chattels of C. D. in your bailiwick, you cause to be made —l., which lately in [*insert the style of the Court*], by a rule of the said Court, intituled, &c., [*as the case may be*], were by the said Court ordered to be paid by the said C. D. to A. B., and which rule was afterwards, on the — day of —, in the year of our Lord —, removed into our Court before us at Westminster, by virtue of an order of our said Court, before us at Westminster, [*or of —, one of the justices of our said Court, before us at Westminster, as the case may be*], in pursuance of the statute in that case made and provided; and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were on the — day of —, in the year of our Lord —, taxed and allowed by our said Court before us at Westminster, at the sum of —l. And we further command you, that of the said goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of —l. (a), together with interest on the said two several sums of —l. and —l., at the rate of four pounds per centum per annum, from the said — day of — (b), and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said monies by the said rule first above mentioned ordered to be paid by the said C. D. to the said A. B., and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are

Writ of fieri facias on an order for payment of money made in an inferior Court, and removed into the Court of Queen's Bench.

(a) The costs of removing the rule of the inferior Court into the Court of Queen's Bench.

of removing the rule of the inferior Court into the Court of Queen's Bench were taxed.

(b) The day on which the costs

Exch. of Pleas,
1839.

authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

—◆—
No. 12.

Writ of fieri facias on an order for payment of money and costs made in an inferior Court, and removed into the Court of Queen's Bench.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you, that of the goods and chattels of C. D. in your bailiwick, you cause to be made —*l.*, which lately in [*insert the style of the Court*], by a rule of the said Court intitled, &c., [*as the case may be*], were by the said Court ordered to be paid by the said C. D. to A. B., and also —*l.* for the costs of the said rule by the said Court also ordered to be paid by the said C. D. to the said A. B. which said rule was afterwards, on the — day of —, in the year of Lord —, removed into our Court before us at Westminster, by an order of our said Court before us at Westminster, [*or of —, one of the justices of our said Court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said Court before us at Westminster at the sum of —*l.*, and we further command you, that of the said goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of —*l.* (a), together with interest on the said three several sums of —*l.*, and —*l.*, and —*l.*, at the

(a) The costs of removing the rule from the inferior Court into the Court of Queen's Bench.

: pounds per centum per annum, from the said *Exch. of Pleas,*
 f —, in the year of our Lord — (a), and 1839.
 ive that money, with such interest as aforesaid,
 t Westminster immediatety after the execution
 e rendered to the said A. B. for the monies by
 le first above mentioned ordered to be paid by
 D. to the said A. B., and for costs and interest
 d, and that you do all such things as by the
 sed in the second year of our reign you are au-
 d required to do in this behalf. And in what
 i shall have executed this our writ make appear
 Westminster, immediately after the execution
 d have there then this writ.

Thomas Lord Denman, at Westminster, on
 ay of —, in the year of our Lord —.

DENMAN,	E. M. ALDERSON,
N. C. TINDAL,	J. PATTESON,
ABINGER,	J. GURNEY,
J. LITTLEDALE,	J. WILLIAMS,
J. VAUGHAN,	J. T. COLERIDGE,
J. PARKE,	T. COLTMAN,
J. B. BOSANQUET,	T. ERSKINE.

y on which the costs inferior Court into the Court of
 the rule from the Queen's Bench were taxed.

HANSBY v. EVANS.

ase issue was joined in January 1838, and
 al given before the under-sheriff of Monmouth-
 e plaintiff in person, and the defendant's attor-
 ed accordingly on the day mentioned in the
 l on, the plaintiff proposed, and the defendant's attorney agreed to, a reference,
 was withdrawn:—*Held*, that the defendant could not afterwards have judgment
 nonsuit, although, by the default of the plaintiff, the reference was delayed, and
 of reference was never executed.

Where the
 plaintiff gave
 notice of trial,
 and both parties
 attended on the
 day mentioned
 in the notice,
 but, before the

Exch. of Pleas,
1839.

HANSBY
v.
EVANS.

notice, but before the cause was called on, a reference to a party named was proposed by the plaintiff and agreed to by the attorney, and the record was withdrawn. The reference was however delayed from time to time by the default of the plaintiff, and the agreement of reference, although prepared, was never signed.

Deedes now moved for judgment as in case of a nonsuit, and contended that as the reference which was proposed on the part of the plaintiff had been rendered abortive by his default, the case was the same as if the cause had not been taken down for trial at all pursuant to the notice.

LORD ABINGER, C. B.—There was no default in not proceeding *to trial*; the default was in not proceeding with the reference according to the agreement of the party.

PARKE, B.—The plaintiff was ready to try before the under-sheriff on the day appointed, therefore there was no default entitling the defendant to judgment as in case of a nonsuit. In *Godfrey v. Wade* (a), where there was a parol submission to a reference, before trial, by an infant plaintiff, who, on an award being made in favour of the defendant, refused to comply with it, it was held that the defendant could not have judgment as in case of a nonsuit, but might proceed to trial by proviso. That case appears to be an authority against the present application.

ALDERSON, B.—If the defendant chooses to let the plaintiff withdraw the cause on an imperfect agreement of reference, it is his own fault. The plaintiff may have committed a breach of agreement, but not a default in proceeding.

Rule refused (b).

(a) 6 Moore, 488.

(b) See *Henkin v. Guerss*, 12 East, 246.

Exch. of Pleas,
1839.

MONKS v. DYKES.

ASS for assault and battery.—Plea, that the defendant was possessed of a *dwelling-house*, and that the plaintiff was making a noise and disturbance therein, and turning him out of the possession thereof, wherefore the plaintiff *molliter manus imposuit* to remove him thence. *n, de injuriâ*. At the trial before *Parke, B.*, at Somersetshire Assizes, the proof was that the defendant was a lodger, occupying one room in the house of *Phillips*, into which the plaintiff had intruded himself, and was turned out by the defendant. The landlady of the house, and kept the key of the outer door. Directed for the plaintiff, that the allegation in the plea that the defendant was possessed of a *dwelling-house*, was sustained by this evidence. The learned Judge was of opinion, but the case of *Fenn v. Grafton* (a) being an authority to the contrary, the verdict passed for the defendant, leave being reserved to the plaintiff to move for a verdict for nominal damages.

A plea, to trespass for assault and battery, that the defendant was in possession of a *dwelling-house*, and that the plaintiff disturbed him in his possession, wherefore he turned him out, is not sustained by proof that the defendant was a lodger, occupying one room in a house, the landlord keeping the key of the outer door.

Having obtained a rule nisi accordingly,

the shewed cause.—The replication puts in issue the material allegations of the plea only; and if the substance of the plea be proved, so as to justify the act done by the defendant, he is entitled to the verdict. One of the material allegations of the plea is, that the defendant is possessed of a *dwelling-house*; but if he be possessed of any premises which would justify his turning out the plaintiff who invaded his possession, that is a sufficient plea in substance. *Fenn v. Grafton* is pre-emptive, and is even stronger than the present case, where there is proof that the plaintiff was in the

(a) 2 Bing. N. C. 617; 2 Scott, 56.

Exch. of Pleas,
1839.

MONKS
v.
DYKES.

separate possession of two rooms of a house was held sufficient to satisfy an allegation that he was in possession of a *messuage*—which is a term having a strict legal import, [*Parke, B.*—It did not appear there that the plaintiff was a lodger, another person having the key of the outer door. The question was not whether a lodger could describe his room as a dwelling-house, but whether an admitted dwelling-house could be described as a *messuage*]. *Tindal, C. J.* says, that “if the declaration had stated that the plaintiff was lawfully possessed of a certain dwelling-house, there can be no doubt, upon the authority of *Lord Coke*, 3 Inst. 65, and many other authorities, the evidence would have supported the allegation.” [*Lord Abinger, C. B.*—The judgment of the Court takes it for granted that there was such an occupation as made it a dwelling-house.] Independently of the authority of that case, this plea is proved in substance. The defendant clearly need not state *all* that he occupies. So, on the other hand, if he had said he was in possession of “certain apartments,” and it appeared that he occupied one only, would not that have been sufficient? A dwelling-house is equivalent to that, for it must consist of one or more rooms; and it is sufficient if the party states himself to be in possession of that which necessarily includes the thing proved. There is no *misdescription*, as if it were *land* instead of *house*, or the like: the only question is, whether the subject is described with such reasonable clearness as that the other party cannot be misled. The distinction between *natural* and *legal* identity, and that the latter must be resorted to as the proper test of variance, is clearly stated by *Mr. Starkie*, 1 Evid. 371.

Erle, *contra*, was stopped by the Court.

LORD ABINGER, C. B.—It appears to me that the replication puts the whole plea in issue, and the substance

of the plea is, that the defendant was disturbed in the possession of his *dwelling-house*, and therefore committed the assault complained of. According to Mr. Crowder's argument, if the defendant proved himself to be in possession of a single brick, an allegation that he was in possession of a brick dwelling-house would equally be supported. A room within a house may be a dwelling-house or it may not; here it was not, and therefore the plea was not sustained.

Exch. of Pleas,
1839.

MONKS

v.
DYKES.

PARKE, B.—I am of the same opinion. I thought at *Nisi Prius* that the plea was not made out; that the defendant should have shewn himself to be in the occupation of a dwelling-house, such as that he could have maintained trespass for the invasion of it, whereas he proved himself to be merely a lodger, in occupation of a room in another person's house. It is very important that accuracy of pleading should be observed: and I should then have acted on my opinion, but for the case of *Fenn v. Grafton*, which, on the cursory examination I then made of it, seemed to be an authority the other way; but on a more attentive consideration of it, I think it clearly is not; it only decides, what is quite correct, that a messuage and a dwelling-house are substantially the same things, and therefore that if rooms be so occupied as to be in fact a dwelling-house, they may be described as a messuage. There was nothing inconsistent in the facts of that case with the supposition of the rooms being occupied as an exclusive dwelling-house. The passage quoted by *Tindal, C. J.*, from Lord Coke (a), clearly refers to a chamber under certain circumstances—where a house is divided into several chambers, with separate outer doors. If that had been the case here, then the room would have been properly described as a dwelling-house. The case of *Fenn*

(a) 3 Inst. 65.

Exch. of Pleas,
1839.

MONKS
v.
DYKES.

v. Grafton, therefore, does not stand in the way of a decision in favour of the plaintiff, and I think that neither in law nor in common sense can a man be described as being in possession of a dwelling-house, where he is a mere lodger.

GURNEY, B., concurred.

Rule absolute.

In the Matter of the GLATTON LAND-TAX.

Where a party has been returned in the schedule of the collector of land-tax for a particular parish, under the 48 Geo. 3, c. 141, as in default for a sum assessed upon him for land-tax in that parish, and the schedule having been duly certified to this Court, a writ of *levari facias* has issued, under which such sum has been levied on his goods, and paid into the receipt of the Exchequer, the Court cannot afterwards set aside the writ, on the ground that the party has been assessed in the wrong parish.

IN Michaelmas Term, *Kelly* obtained a rule to shew cause, on behalf of William Margetts, of Huntingdon, Gent., why three several writs of *levari facias* directed to the sheriff of Huntingdonshire, commanding him to levy out of the goods and chattels, lands and tenements, of Edward Smith, the tenant of the said William Margetts, the several sums therein respectively mentioned to be due to his late Majesty from the said Edward Smith, arising from the land-tax charged upon him in the parish of Glatton, in the county of Huntingdon, should not be set aside. The affidavits of Mr. Margetts, on which the rule was obtained, stated the following facts:—

In December, 1824, Mr. Margetts purchased a farm in Holme Fen, in the parish of Holme, in the hundred of Norman Cross and county of Huntingdon, consisting of about 640 acres. The vendor was also owner of another farm at Glatton, an adjoining parish to Holme, and situate also in the same hundred and county; and in the spring of 1825, the latter farm was also sold and conveyed by him to another purchaser. The solicitor to this purchaser, a Mr. Morley, was also clerk to the commissioners of land-tax for the hundred of Norman Cross. At Michaelmas 1825, Mr. Margetts paid to the tax collector of the parish of Holme, the two half years'

Land-tax then due in respect of his farm at Holme. At Michaelmas 1826, after having paid the sum of 10*l.* 14*s.* 6*d.* to the Holme collector for the land-tax of that year, he was called upon by the collector for Glatton, who stated that he came by desire of Morley for 7*l.* 14*s.* 6*d.* for a year's land-tax, which he alleged was payable to the parish of Glatton in respect of the farm at Holme. Mr. Margetts having refused to pay the Glatton collector, in April, 1828, the Glatton assessors, with Morley as their adviser, distrained his cattle for two and a half years' land-tax assessed on him by the Glatton assessors in respect of his farm at Holme. Mr. Margetts thereupon commenced an action of trespass against Morley and the assessors, which came on for trial at the Huntingdon Summer Assizes, 1828, when a verdict was taken for the plaintiff, subject to a special case for the opinion of the Court of King's Bench. When the case came on for hearing, the defendants' counsel raised a question whether, although the lands in question were situate within the hamlet of Holme, they did not form part of the parish of Glatton; and a new trial was thereupon granted, and the cause again came on for trial at the Spring Assizes, 1831, when that point was left to the jury, and a verdict was again given for the plaintiff. A rule was afterwards obtained for a new trial, partly on the ground that it should have been left to the jury to say whether the farm had not been usually assessed to Glatton; but the Court were of opinion that by the Land-tax Act, 38 Geo. 3, c. 5, s. 53, every person ought to be assessed in respect of his lands in the places where they lie. The assessors for the time being of Glatton, nevertheless, continued to assess Mr. Margetts, and subsequently his tenant, Smith, for land-tax in Glatton parish in respect of the farm at Holme, but they always refused to submit to such assessments. On the 31st of January, 1837, three writs of *levari facias* were issued out of this Court, directed to the sheriff of Huntingdonshire, com-

Exch. of Pleas,
1839.

In re
GLATTON
LAND-TAX.

Exch. of Pleas,
1839.

In re
GLATTON
LAND-TAX.

manding him to levy out of the goods and lands of Smith the sums therein respectively alleged to be due in respect of land-tax charged on him in Glatton. Previously to the execution of these writs, Smith gave notice in writing to the sheriff that they had been wrongfully issued, and that the said sums had been illegally charged on him, and his goods and lands were not legally liable to the payment of any part thereof, and that he protested against any seizure or sale of his goods or lands under the writs, and intended to take such legal proceedings in respect of the premises as he might be advised. The sheriff, however, by virtue of the said writs, entered upon the premises and distrained some of Smith's cattle. Shortly afterwards Smith died: and an action was thereupon commenced in the Court of King's Bench, in the name and with the concurrence of his executors, against the sheriff, for the trespass so committed by him in the execution of the said writs, to which he pleaded that he made the entry and distress complained of under the writs. The affidavit then stated that the deponent was advised by counsel that the matter so pleaded was a sufficient answer in law to the trespass complained of, and that there was no remedy for the injuries sustained by such entry and distress, otherwise than by application to set aside the writs of *levari facias*: that the farm in respect of which the land-tax was assessed to Glatton, is situate at Holme and not elsewhere; that it was proved on the said trials that before the purchase of the farm by the deponent, no Holme tenant had paid or been required to pay land-tax to Glatton, and that the name of a Holme tenant had not for forty years appeared on the Glatton assessment; and that the farm is not part of any common or waste lands which since the inclosure thereof had been assessed to the land-tax in any other place than the parish in which the lands lie.

In opposition to the motion, an affidavit was made by the solicitor to the office for Stamps and Taxes, which

stated, that by three several schedules made and sworn to as the law requires, by the collector of the land-tax for the parish of Glatton, and by him delivered to the receiving inspector of the land-tax for the county of Huntingdon, in pursuance of the several statutes in that behalf, Edward Smith, of Holme, was named as having made default in payment of the three several sums of money after-mentioned, which had been assessed upon him by three several assessments of the land-tax in the parish of Glatton, viz. the sum of 7*l.* 16*s.* 6*d.* for each of the years 1834 and 1835, and the sum of 3*l.* 18*s.* for half a year ending on the 29th of April, 1836: that the said three schedules were afterwards duly certified to this Court under the hand of the receiving inspector, and thereupon, on the fiat of a Judge, the three writs of *levari facias* in question were issued on the 1st of February, 1837, and executed by the sheriff: that on or soon after the return thereof, the sheriff paid the said three several sums of money to the receiving inspector, as directed by the writs, and the same were afterwards in due course paid into the receipt of Her Majesty's Exchequer: and that by the payment of the said sums to the receiving inspector as aforesaid, the parish of Glatton became and is discharged from all liability in respect of the same.

Each. of Pleas,
1839.

In re
GLATTON
LAND-TAX

The *Attorney-General* now shewed cause against the rule.—This application is much too late. It may be admitted that Mr. Margetts has been aggrieved, but he ought to have appealed against the assessments when made, or then to have made summary application to this Court. A certain sum is assessed on Glatton parish, and it is wholly immaterial to the Crown upon what property it is raised. The Crown receives no more from these sums being assessed in Glatton as well as in Holme: the parish of Glatton would have to pay precisely the same sum, each district being liable to the Crown for the sum it ought to

Exch. of Pleas,
1839.

In re
GLATTON
LAND-TAX.

raise, and the Crown having no interest whatever in the manner in which it is raised. The course to be pursued under the land-tax acts, 48 Geo. 3, c. 141, rule 5, and 4 & 5 Will. 4, c. 60, is this: there is a certain sum to be levied on every county in England, which is distributed among the different parishes and districts in each county, and each parish and district is then liable to the Crown for the sum it ought to raise. A return is made to the Crown from each district, and if there be any defaulter, a writ of *levari facias* issues, and the sum stated in it, when raised, makes up the quota which the particular parish or district is liable to pay. If that sum be not made up, the parish is to be re-assessed, and the Crown is so to be secured. Now here it appears that schedules were regularly returned from the parish of Glatton, whereby it appeared that Smith was in default to the amount of these three assessments: thereupon the writs of *levari facias* issued, under which the arrear was raised, and paid into the hands of the proper officer. The deficiency was thereby made up, and the Crown has got the amount it ought to receive, and no more. But if the writs be set aside, the Crown would have no remedy against Glatton, which has paid its full quota, and is now exempt. If this application had been made in an earlier stage, it might have been put into such a shape as to leave the parish of Glatton liable; but that would not have been an application against the Crown, which has no interest in the question. [*Parke, B.*—What is the remedy given to a party by the land-tax acts, if he be assessed in a wrong place, which is the complaint here?] Whatever be the remedy, it cannot be by means of such an application as this; the proceedings under which the money has been levied to the use of the Crown have all been perfectly regular. The consequence of this application being granted would be, that the sheriff would be liable to an action, although it is admitted that he was justified under the writs. [*Parke, B.*—The writs would

be a protection to the sheriff, although set aside for irregularity]. It is not sought to set them aside for irregularity, but as being void ab initio: and the very object of the application is to enable the party to recover against the sheriff, and deprive him of this defence. If the writs would be a good defence notwithstanding, the application is useless; if not, it ought not to be granted. But further, the parties representing the Crown have been guilty of no default or irregularity: the Crown has no control over the assessments, and does not interfere until the whole amount has been raised, or a schedule has been returned stating the defaulters: the schedules having been so returned here, the writs were properly and necessarily issued. The delay, however, is of itself a sufficient answer to the application.

Exch. of Pleas,
1839.

In re
GLATTON
LAND-TAX.

Kelly, contra.—The argument on the other side goes to this extent, that the Crown may issue a writ of *levari facias* to levy upon any subject of the realm to any amount, and that when the goods of the subject are seized and sold, he is to be without remedy. These returns and schedules are all made by officers of the Crown in a particular department, wholly unknown to and beyond the control of the party affected by them. In the present case, it is admitted that Mr. Margetts has no land in Glatton; that his farm has been always assessed in and paid to Holme; and that his right of exemption from payment to Glatton has been solemnly decided by the Court of King's Bench. [Lord *Abinger*, C. B.—When, after that judgment, the assessors still assessed him in the wrong district, were not they liable to an action?] No—the officer is not liable for merely assessing, which is no more than entering the name of the party, with certain figures against it, in a book in his own office; it is only when he endeavours to put the law in force and to seize the goods of the party, that he has any remedy. [*Parke*,

Exch. of Pleas,
1839.

In re
GLATTON
LAND-TAX.

B.—But the Crown has obtained no more than it is entitled to.] That is not the question here: the complaint is, that the whole proceedings are *ex parte*, and that the party charged has no means of having access to any part of them. [*Parke, B.*—You refuse to pay, because you say you are not bound to pay; then the collector returns you as in default, which he is right in doing: your remedy, if any, is against the assessor for putting your name in the assessment, in consequence of which you are liable to the subsequent proceedings.] It is submitted that there is no remedy at all except by means of this application. The assessor does no wrong to the individual by merely inserting his name, and no action could be maintained against him for it; it might even be done by mistake, or under the advice of counsel. Until some actual step be taken against the party charged, as by distress, he is not aggrieved. The recent statute, 1 & 2 Vict. c. 58, s. 2, (which was subsequent to these proceedings) does provide a remedy for such cases in future, which is to operate at the period when the assessment is made; which shews that no means existed before of impeaching a wrongful assessment. Is then the subject wholly without remedy, where proceedings issue in the suing out of a writ against him *ex parte*, and his goods are seized and sold without his being heard in his defence, and without having had any means of rectifying the proceedings? All the courts of law have an inherent power over writs which have issued out of them; this writ differs from others only as being of a more stringent and severe nature; but where one has issued improperly, the Court may interfere and control what has been done under it. It is said the Crown has gained nothing; but is it any answer, where the Crown has taken from a subject money which he was not bound to pay, that somebody else owed it? Nor is it any answer for an officer in a higher department to say he acted on the statement of a subordinate officer. The lateness of

the application is satisfactorily accounted for by the circumstances: and it is to be remembered that this is an application against the Crown, against whose claims there is no bar by lapse of time. It is not therefore like the cases of applications under rules of Court for setting aside suits for irregularity, which must no doubt be made promptly. And with regard to the sheriff, the action against him has been discontinued and the costs paid, and there is no intention of bringing a fresh action. [Lord Abinger, C. B.—If that be so, what do you gain by setting aside the writ?] Mr. Margetts would have the judgment of this Court that the writs were improperly issued, and on a petition being presented to the Crown for re-payment of the money, he would be in much better position.

Exch. of Pleas,
1839.

In re
GLATTON
LAND-TAX.

LORD ABINGER, C. B.—I think we cannot accede to this motion, upon the ground that there is no other remedy. It does not follow, because the statute does not provide any other remedy than that the party applies for, that he is entitled to that: the question is, whether this is the right remedy—whether there is any other it is not for us to say. What does he ask?—to set aside a writ that has been issued according to the precise terms of the Act of Parliament, and the issuing of which is not a matter of blame to any party,—which has been satisfied, and the money paid to the Crown. If in any earlier stage of the business, and before the Crown had received the money, he had applied to the Court to interpose any delay, to hold the hands of the sheriff, the question might have been different. I am, upon principle, inclined to agree that the Crown is not entitled to receive of one man what ought to have been paid by another, if the Crown has any means to prevent it: but that is not the question. The Crown has received no more than it ought: the applicant says it has been received from a wrong person; but the Crown cannot interpose now—they say the writ has been

Exch. of Pleas,
1839.

In re
GLATTON
LAND-TAX.

regularly issued, but if we were to set aside the writ, no legal remedy would remain to the Crown. Mr. Kelly states there is often an application to the candour of the Crown; but we cannot act contrary to the principles of law, in order to enable the parties to apply with better grace to the favour of the Crown. We cannot consider whether the Crown would refund the money, unless it was bound by law to refund it; and it is clear it is not bound by law to do so, because it has got no more than it ought to have. The cause of the complaint is the improper conduct of some parties who have taxed Mr. Margetts in some place where he ought not to have been taxed. It appears to me that there ought to be some remedy against them, and if at an earlier stage an application had been made to the Court to interfere, before the Crown had got the money, the question might have borne a different aspect; but at present we cannot give him any redress. It appears to me that there is no ground in equity or law for complying with this application.

PARKE, B.—I am of the same opinion. The case is certainly one of great hardship upon Mr. Margetts, but we know that in future it will cease to exist. An act was introduced, in consequence of the difficulty this Court felt when a question of this kind was before it, in order to give a remedy in future. It is clear we cannot set aside the writ in order to give a right of action against the sheriff; that would not be just, even if it would give a remedy, which it would not, since the sheriff is justified nevertheless. It is said the object is to set the writs aside in order to afford ground for an application to the Treasury. We cannot do that. If we cannot make it the ground of an order to pay back the money which is in the Treasury, we ought not to set them aside at all. Whether there is any other remedy it is not for us to decide; we cannot give the remedy as it is asked.

JURNEY, B.—It is very clear that these writs are regulated and that the form prescribed by the act has been strictly adhered to, and therefore they cannot be set aside. If Mr. Margetts was aggrieved by the assessment, he had notice of it, and might have taken any steps he pleased. When the sheriff levied, he had notice, and before the money got into the hands of the Crown, he might have applied to the Court, and the Court would, if it could, have given him relief; but the money has now been received—the Crown has received its quota from the parish, and has received no more; and now, if Mr. Margetts is to succeed in getting back the money, the mode in which the Crown must be reimbursed would be by a new assessment, and in that case injustice would be done to others.

Exch. of Pleas,
1839.

In re
GLATTON
LAND-TAX.

Rule discharged.

LEAF v. LEES.

EBT.—The declaration stated that the defendant, to whom on the 20th day of August, 1838, was indebted to the plaintiff in the sum of 50*l.* for goods sold and delivered, and in 50*l.* for money found to be due on an account before then stated between them.

The defendant demurred specially to the latter count, on the ground that no time was alleged at which the account was stated. Joinder in demurrer.

Ball, in support of the demurrer, relied on *Ferguson v. Thelwell* (a) as in point, the authority of which case was admitted in *Spyer v. Thelwell* (b), and in *Lane v. Thelwell* (c), in which last case Lord Abinger, C. B. and Parke, distinguished between a count for goods sold and de-

A declaration in debt stated that the defendant on a certain day was indebted to the plaintiff in 50*l.* for goods sold and delivered, and in 50*l.* for money found to be due upon an account before then stated between them:—*Held*, on special demurrer, that the count on the account stated was sufficient.

(a) 2 C. M. & R. 687.

(b) *Id.* 692.

(c) 1 M. & W. 140.

Each. of Pleas,
1839.

LEAF

9.

LEAF

livered, and an account stated, holding that the statement of time was necessary in the latter.

The Court then called upon

Hayes to support the count.—No decision of this point took place in *Ferguson v. Mitchell*, for the plaintiff had judgment in that case because the demurrer was too large. What is there said in relation to the necessity of inserting the time at which the account was stated, is therefore only a *gratis dictum*. Upon principle it is unnecessary. The rule which requires time to be stated is confined to traversable allegations, and a time is alleged with respect to the material and traversable allegation in this count, that the defendant was indebted to the plaintiff; for the date in the preceding count for goods sold and delivered must be considered as incorporated into the count on the account stated. The rule is sufficiently complied with by the statement of one date in the count, and there can be no good reason for requiring the repetition of another. In *Lane v. Thelwell*, it was decided that it was unnecessary, in a count for goods sold and delivered, to allege the time when the goods were sold, and it must follow that it is equally unnecessary to allege when the account was stated, otherwise an artificial and inconvenient distinction will be created with respect to the common *indebitatus* counts, all of which ought to stand upon the same principle. [Lord Abinger, C. B.—The count for goods sold is so framed as to admit of proof of different goods sold at different times.] It is submitted that the same principle should apply to an account stated. Any admission by the defendant of a specific sum being due to the plaintiff is receivable in evidence under the count for an account stated, as there appears no good reason why a mere admission should not be received under the same count. No case has been

Each. of Pleas
1830.

LEAR

LEAR

decided to the contrary. And if it be necessary to allege the time of stating the account, because the count is in its terms confined to a single transaction, such an allegation would become equally necessary in a count for goods sold and delivered, in any case in which that count was in terms confined to a single transaction: as for instance, a horse sold and delivered. [*Parke, B.*—The count is neither in accordance with the forms prescribed by the rules of Trin. T. 1 Will. 4., nor is it in accordance with the course of precedent before those rules.] Those rules did not introduce any alteration in the principles of pleading, but only in the forms; and their sole object was to check useless prolixity. This appears from the case of *Lane v. Thelwell*, where the pleader departed from the form given by those rules by omitting the word “then,” and the Court nevertheless held it sufficient. And with respect to the practice before the rules, it is not supported by any authority, and many unnecessary statements of time and place were then introduced. This point has, within a few days past in this term, been before the Court of Queen’s Bench in *Bingley v. Durham* (a), and the Court held the count good. [*Ball*, in addition to the authorities he had previously cited, mentioned *Higgins v. Highfield* (b), and *Denison v. Richardson* (c).] In both of those cases there was an entire omission of any date to a material and traversable allegation. In the present case, one date is stated, viz. the date of the defendant’s becoming indebted to the plaintiff; and the only question is, whether there should be an unnecessary repetition of that date.

Cur. adv. vult.

In this term,

LORD ABINGER, C. B., said,—As the Court of Queen’s Bench have decided that the allegation of time in a count

(a) Since reported, 1 Per. & D. 58.

(b) 13 East, 407.

(c) 14 East, 291.

Arch. of Pleas,
1839.

LEAF
v.
LEES.

upon an account stated is unnecessary, it seems advisable to follow the same course, especially as it is a mere matter of form.

Judgment for the plaintiff.

YOULTON v. HALL.

A writ of summons stated the action to be "action on the case promises:"—*Held* insufficient, and the Court set it aside for irregularity.

WALLINGER, on a former day, moved for a rule to shew cause why the copy of the writ of summons served on the defendant should not be set aside, on the ground that the form of action stated therein was "action on the case promises." Although the omission of the word "on" might in some cases be supplied by intendment, here it could not, because even if it were, there would not be such a description as the Uniformity of Process Act required. The form there given is (a) "action on promises," and the phrase "trespass on the case on promises" has been held bad, because it does not pursue the form given: *Gurney v. Hopkinson* (b). Here, no word can be held mere surplusage, because it is doubtful from the words used in the writ, whether case or assumpsit be intended, and whether the words "the case" or "promises" should be rejected. The Court having granted a rule,

Humfrey now shewed cause.—It is quite clear that the word "on" merely is omitted, and the Court ought so to intend. In *Cooper v. Weale* (c), it was held that the omission of the word "on" was not material.

PARKE, B.—There the words were "action promises," from which it was clear that assumpsit was intended. In the

(a) 2 Will. 4, c. 39, Schedule I.

(b) 3 Dowl. P. C. 190.

(c) 4 Dowl. P. C. 281.

Present case, it is doubtful what was meant, and we do **n**ot know whether we ought to reject words for the **P**urpose of making it case, or assumpsit.

Exch. of Pleas,
1839.

YOULTON
v.
HALL.

Rule absolute.

Wallinger also moved to set aside the copy of the writ of summons and the service thereof, on the ground that the requisites of the Uniformity of Process Act had not been complied with, the indorsement on the writ, in giving the residence of the attorney, having omitted to state the county.—The form of the writ and indorsement is given in Schedule I. of the act, and the rule of M. T., 3 Will. 4, s. 10, provides, that if the plaintiff, or his attorney, shall omit to insert in, or indorse on, any writ or copy thereof, any of the matters required by the act to be by him inserted therein, or indorsed thereon, such writ or copy thereof may be set aside as irregular, on application to the Court. An accurate description of the residence of the attorney must be given: and in *Lloyd v. Jones* (a), “No. 32, Great James Street, Bedford Row,” was held insufficient. [Lord Abinger, C. B.—The description there held insufficient was that of the party himself, and if the writ be sued out by the party in person, the description must be of the city or county; but that requisite is confined in the act to the party himself]. The judgment of the Court proceeds upon the ground, that, independently of the party, the agent’s description was not sufficient. The act contemplates two cases—suing out a writ either in person, or by attorney. In the former case, that which is required to be stated is fully specified: and in the latter case it is understood, because the words in the form required to be indorsed are:—“This writ was issued by E. F., of ———, attorney for the said A. B.”—leaving a blank: and in *Lloyd v. Jones*,

In the indorsement of the residence of an attorney on a writ of summons, it is not necessary to state the county, unless otherwise it would be calculated to mislead.

(a) 1 M. & W. 549; 5 Dowl. P. C. 161.

Exch. of Pleas,
1839.

YOULTON
v.
HALL.

the Court said, the indorsement was insufficient, because the agent's residence was not fully stated, and the act expressly contemplates the case of an agent.

PARKE, B.—I think, in the case of an *attorney*, a description of residence not mentioning the county is sufficient, provided the description be such as is not calculated to mislead.

Rule refused.

RAMSBOTTOM and Others v. ROBERT DAVIS.

SAME v. GOSDEN.

By a written agreement, three persons bound themselves that in consideration of A.'s discharging a debt due from B. to C., amounting to 200*l.*, with the costs thereupon, each of the three would severally pay 50*l.*, and one fourth part of such costs, and give a bond, bill, or note for his own proportion:—
Held, that the agreement required only one stamp.

ASSUMPSIT.—The declarations in these actions were upon the following guarantee:—

“ We, the undersigned, Robert Davis, William Goodchild, and George Gosden, *severally and respectively* undertake, in consideration of Messrs. Ramsbottom's and Legh's discharging, or agreeing to discharge, a certain debt due from William Davis to J. Sheffield, amounting to the sum of 200*l.*, with the costs thereupon, to indemnify the said Messrs. Ramsbottom & Legh for any loss which they may sustain or incur to the extent of 50*l.* from *each* of us, to *be paid by us severally*, together with a fourth part of the costs and expenses as aforesaid, at such time or times as the said Messrs. Ramsbottom & Legh may be called upon to pay the said debt and costs, to be rateably proportioned; and in the meantime we further undertake to make and execute such bills, bonds, or notes *severally*, for the said respective sums, as may be required by the said Messrs. Ramsbottom & Legh.

(Signed)

“ ROBERT DAVIS.

WILLIAM GOODCHILD.

GEORGE GOSDEN.”

At the trial of these causes, at the sittings in this term, before *Gurney*, B., the above agreement was produced in evi-

dence, and appeared to be stamped with one stamp only, on which the counsel for the defendants objected to its being read, contending that it amounted to a several agreement by each of the parties, and consequently that it should have had three stamps. The learned Judge, however, allowed it to be read, and the plaintiffs had a verdict for 50*l.* in each cause, but leave was given to the defendants to move to enter a nonsuit.

Exch. of Pleas,
1839.

RAMSBOTTOM
v.
DAVIS.

W. H. Watson now moved accordingly.—One stamp is not sufficient in this case, as this is not the joint contract of the three, but each makes a separate contract; each party makes himself liable to the extent of 50*l.*, each agrees to pay one-fourth of the costs, and each undertakes to give a bond, bill, or note severally for his own proportion. It is not like the case of one common fund. [*Parke, B.*, referred to *Bowen v. Ashley (a)*.] In that case there was but one bond and one penalty, and the payment of that penalty by any one of the obligors was a performance of the bond. [*Parke, B.*—This is one transaction; no one of the parties would have agreed to pay his 50*l.* if the others had not contracted to pay theirs. It is like the common case of a composition deed by several creditors, where each agrees to release his debt because the other does, and in those cases one stamp is sufficient.] In those cases there is but one composition, and the *covenants* only are several, but here there are separate *contracts*, as in *Doe d. Copely v. Day (b)*, *Powell v. Edmunds (c)*, and *Rex v. Reeks (d)*.

PARKE, B.—I am of opinion that this is only one transaction, and that one stamp only is necessary. Here each of the parties entered into one agreement, by which each bound himself to a certain extent, in consideration that

(a) 1 N. R. 274.

(b) 13 East, 241.

(c) 12 East, 6.

(d) Lord Raym. 1445.

Esch. of Pleas,
1839.

RAMSBOTTOM
v.
DAVIS.

the others would do the same. It is very similar to the case of *Bowen v. Ashley*, where it was held, that if several persons bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matter, such bond required only one stamp. There are several cases of the same class, especially those of composition deeds. In *Davis v. Williams* (a), though the agreement was several as to each subscriber, it was held that it required only one stamp. The same principle governs this case. It is an agreement by each to pay a proportion, which each enters into because the other does. The rule must be refused.

ALDERSON and GURNEY, Bs., concurred.

Rule refused (b).

(a) 13 East, 232.

(b) See also *Allen v. Morrison*, 8 B. & C. 565; 3 Man. & Ryl. 70.

RUST v. KENNEDY.

Where, in the writ and declaration, in an action not upon a written instrument, the defendant is described by the initials of his name, the only remedy is by summons to amend, under 3 & 4 Will. 4, c. 42, s. 11; and the Court will not set aside the proceedings for irregularity.

ARCHIBOLD had obtained a rule to shew cause why the writ and declaration in this cause should not be set aside for irregularity, on the ground that the defendant was described in the writ served and declaration by his initials only, the action not being brought upon a bill of exchange, or other written instrument.

Jardine now shewed cause.—The remedy here sought is not the remedy pointed out by the statute 3 & 4 Will. 4, c. 42, s. 11. The defendant ought to have applied under that section to have the declaration amended at the costs of the plaintiff, by inserting the Christian name at length, upon a judge's summons, founded upon an affidavit of the right name. That is the course directed by the statute, and the Court has no power to set aside the proceedings.

In *Lindsay v. Wells* (a), the Court refused to do so under similar circumstances, although in that case there had even been an arrest, which makes it much stronger than the present case.

Exch. of Pleas,
1839.

RUST
v.
KENNEDY.

Archbold, contra.—This is more than a mere case of misnomer, for the initials are no name at all. Lord *Ellenborough* said no man was ever baptized by his initials, as “I. G.” The application to amend by summons is therefore not compulsory in this case. The case of *Lindsay v. Wells*, which has been referred to, must have been upon a bill of exchange (b).

PARKE, B.—Formerly, before the stat. 3 & 4 Will. 4, c. 42, s. 11, where the declaration and process corresponded, and the only objection was a misnomer, that was a matter pleadable in abatement; but since the passing of that act, the only remedy is for the party to take out a summons to amend. The case is within the statute, and the rule must therefore be discharged with costs.

Rule discharged with costs.

(a) 3 Bing. N. C. 777; 4 Scott, 471.

(b) It appears from the report in Scott that this was the case; but that the application there was to set aside the declaration, or to amend it under the statute, on the

ground that the *plaintiff* was described by an initial letter only of one of his Christian names: and the Court intimated an opinion that misnomer of a *plaintiff* was not within the statute.

HOLLAND v. HENDERSON.

IN this case a rule had been obtained for judgment as in case of a nonsuit; against which

Pashley shewed cause, and contended that the rule ought to be discharged, on the ground that the defendant had become insolvent after action brought, and a *stet processus* had been offered and declined.

Where the defendant has become insolvent since action brought, a rule for judgment as in case of a nonsuit will be discharged *with costs*, unless a *stet processus* be accepted.

Exch. of Pleas,
1839.

HOLLAND
v.
HENDERSON.

The Court, referring to *Smith v. Badcock* (a), said, that according to the practice the rule must be discharged *with costs*, unless the defendant consented to a *set process*.

Rule discharged with costs.

(a) 5 Dowl. P. C. 91.

ROGERS v. PETERSON and Another.

An attorney is not compellable to pay the costs of taxation, on the ground of more than one sixth having been taken off his bill, unless there have been either an undertaking by the party to pay the bill, or money brought into court, with an agreement by the party that it shall be appropriated to that purpose; since otherwise it is not within the stat. 2 Geo. 2, c. 23, s. 23.

BY a Judge's order, dated the 2nd of October, 1838, the sheriff obtained leave to pay into Court the amount of the levy made by him under a *fi. fa.* on a judgment in this case, to abide the event of a motion on the part of the *plaintiff*, to set aside such judgment and execution, which the sheriff accordingly did. On the 13th of October, an order was obtained for the attorney to deliver his bill of costs, to be taxed by the Master; and more than one sixth having been taken off on taxation, application was made that the plaintiff should be allowed the costs of the taxation. That application was opposed and refused on the ground that the order for taxation did not contain an undertaking to pay what, upon taxation, should be found to be due. It also appeared, that on the 5th of September, a notice had been given by Mr. Haydon (the plaintiff's late attorney) to each of the defendants not to pay any sums due on the judgment to any person but himself, as he had a lien on the judgment for his costs of the cause. *Barstow* having, on a former day, obtained a rule calling on Mr. Haydon to shew cause why he should not pay to the plaintiff the costs of the taxation,

Swann now shewed cause, and contended, that as there was no undertaking by the party to pay the bill of costs when taxed, or so much as should be found to be due, the case did not come within the statute 2 Geo. 2, c. 23, s. 23;

and therefore that the Court had no authority to order the attorney to pay the costs of taxation.

Exch. of Pleas,
1839.

ROGERS
v.
PETERSON.

Barstow, contra.—The money paid into Court stands in the place of an undertaking by the party to pay what shall be found to be due, especially after such a notice as that given to the defendants in the present case. [*Parke*, B.—If the money brought into Court was not appropriated to the payment of the bill of costs, it is not equivalent to an undertaking. The words of the statute are, that “upon submission to pay the whole sum that upon taxation shall be allowed,” the bill delivered may upon application be referred for taxation, without bringing the money into Court. The difficulty here is, to shew that this money was brought into Court for the purpose of paying the bill of costs, or, having been brought into Court, that it has been appropriated afterwards for that purpose by agreement.] It is submitted that this money is substantially appropriated to that purpose, under the circumstances of this case. The attorney gave notice to the defendants not to pay any sums due on the judgment to any person but himself, as he had a lien on it for his costs of the cause. After that, the money is brought into Court, not indeed originally for this purpose, but the Court afterwards makes an order for the attorney to deliver his bill for taxation, by which the money was substantially appropriated to the payment of the amount which should be found to be due.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be discharged, as the case is not within the statute. The money was not brought into Court originally for the purpose of settling the bill, but for another purpose, arising incidentally, and after that, it still remained so appropriated. The rule must therefore be discharged, but, I think, without costs.

Exch. of Pleas,
1839.

ROGERS
v.
PETERSON.

PARKE, B.—This case does not appear to me to be within the statute, and then we have no power to grant this rule. To come within the statute, there must either be an undertaking to pay the bill, or money must be brought into Court, and agreed by the party to whom it belongs that it shall be appropriated to that purpose. Here there is neither of those requisites.

Rule discharged, without costs.

HALL v. HAWKINS.

Where a defendant was arrested under an attachment out of the Court of Chancery for nonpayment of costs, and a *capias utlagatum* out of this Court, at the suit of the same party who was the plaintiff in the equity suit, was on the same day lodged with the sheriff; and the arrest under the attachment was afterwards set aside by the Court of Chancery, for irregularity:—*Held*, that the defendant was entitled to be discharged as to the *capias utlagatum* also.

R. v. RICHARDS had obtained a rule to shew cause why the defendant should not be discharged out of custody, and why the proceedings in outlawry taken against him should not be set aside. It appeared from the affidavits, that an attachment had issued out of the Court of Chancery against the defendant, for non-payment of costs in a suit in that Court instituted against him by the present plaintiff; and the defendant was taken under that attachment. On the same day, a *capias utlagatum* was issued out of this Court against the defendant in this cause, and lodged with the sheriff. The arrest under the attachment was afterwards set aside by an order of the Master of the Rolls, *for irregularity*. Under these circumstances, it was contended that the plaintiff, at whose suit the irregular process had issued, could not avail himself of the subsequent detainer.

Barstow shewed cause.—Two questions arise in this case; first, whether the detainer of the defendant, on the process out of this Court, was legal; next, if it was, whether the defendant is entitled to his discharge as being in custody on mesne process, and if so, on what terms? Now the terms of the order of the Master of the Rolls shew

that the process under which the defendant was taken was irregular only, and did not therefore render the arrest *illegal*. That being so, it is clear that the subsequent detainer would not be avoided thereby, if it were at the suit of a different plaintiff; *Barratt v. Price* (a); the question is, whether that is so where it is at the suit of the same party. Now the custody was at the time *legal*, although irregular as regarded the plaintiff. Where a defendant is discharged from legal custody, whether civil or criminal, it has been held that he has no privilege from arrest in returning home: *Anon* (b); *Goodwyn v. London* (c). In *Machin v. Warren* (d), the Court refused to discharge the defendant from custody under a ca. sa, on the ground that he had been before irregularly taken and discharged under criminal process at the suit of the same plaintiff. [*Parke, B.*—The objection here is, that the custody is unlawful quoad the same plaintiff—he cannot take advantage of his own wrong. The only difficulty I feel is, whether a *capias utlagatum* can be considered as a process purely for the benefit of the party. By the practice and usage, he obtains the benefit of it; but it is not his writ, like a ca. sa.] He obtains the benefit only by means of an application to the Treasury, which is a proceeding that a court of law cannot take notice of. [*Parke, B.*—An outlawry may be *reversed* without an application to the Crown. If the writ had not been put in motion by the plaintiff, it never would have been there.]

Exch. of Pleas,
1839.

HALL
v.
HAWKINS.

Richards, *contra*, was stopped by the Court.

LORD ABINGER, C. B.—I think that where the process is at the suit of the same party, we must consider the irregularity of it as constituting an illegality as against

(a) 9 Bing. 566; 2 M. & Scott, 634.

(c) 1 Ad. & E. 378; 3 Nev. & M. 879.

(b) 1 Dowl. P. C. 157.

(d) 5 Bing. 176; 2 M. & P. 279.

Exch. of Pleas,
1889.

HALL
HAWKINS.

him, although not as against the sheriff or another plaintiff. It is an unlawful arrest *by this plaintiff*: then he detains the defendant under process of outlawry, taken out for his benefit. The case falls within the principle that a party cannot take advantage of his own wrong.

PARKE, B.—It seems to me that is the true principle—that the plaintiff cannot take advantage of his own wrong. If he improperly place the party in custody, he cannot detain him by means of any process at his suit and for his benefit. The only doubt I had was, whether this was the process of the party for his benefit: but I think we must so consider it; the defendant never would have been taken under it, if it had not been put in motion by the plaintiff, and used for his benefit. Strictly speaking, the process of attachment is not at the suit of the party, but for contempt of the Court.

GURNEY, B., concurred.

Rule absolute for discharging the defendant out of custody; and also for reversing the outlawry, on the defendant's putting in bail in the alternative (a). No action to be brought.

(a) See *Levi v. Claggett*, 1 M. & W. 547.

WATSON v. CARROLL and Another.

CASE.—The declaration stated, that before and at the time of the committing of the grievances, &c., the plaintiff **A party privileged from arrest redeundo was arrested on a writ of capias ad respondendum, and applied for and obtained a Judge's order for his discharge in that action, on the ground of his privilege. At the time of his arrest, other writs of ca. sa. against him were in the hands of the sheriff:—Held, that the sheriff was justified in detaining him on those writs, notwithstanding notice of the Judge's order.**

had been and was a practising barrister, and the defendants had been and were sheriff of Middlesex, and that the plaintiff, to wit, on the 10th of August, 1838, then being such barrister, was present in and attended the Court of Chancery, before the Vice Chancellor, in Lincoln's Inn, in the county aforesaid, for the purpose of being heard as counsel for the defendant in a certain suit, (naming it); and that afterwards, to wit, on the day and year last aforesaid, the plaintiff, then being such barrister, and then having been attending the said Court, was returning to his chambers, situate, &c.; and that the defendants afterwards, and during the time they were such sheriff, to wit, on &c., when the plaintiff was so returning from the said Court, took and arrested the plaintiff by his body, and then had and detained him the said plaintiff, as such sheriff, by virtue of a certain writ of capias, bearing date &c., issued out of the Exchequer of Pleas at Westminster, and directed to the defendants, as such sheriff, by which they were commanded not to omit &c., but to take the plaintiff, and safely keep him until he should have given bail, or made deposit, &c., in an action on promises at the suit of Clarke and Another, or till the plaintiff should by other lawful means be discharged from their custody (indorsed to take bail for 30*l.* and upwards); and that afterwards, to wit, on the 11th day of August, 1838, by a certain order of Sir John Taylor Coleridge, Knight, one of the Judges of the Court of Queen's Bench; made in the said last mentioned action, bearing date on the day and year last aforesaid, it was ordered that the plaintiff should be discharged, as to the last mentioned action, out of the custody of the defendants as such sheriff, &c., the plaintiff having been arrested on returning from the Court of Chancery to his chambers; of which order, and of its having been made on the ground of the plaintiff having been privileged from arrest as a practising barrister, returning from the Court of Chancery

Exch. of Pleas,
1839.

WATSON
v.
CARROLL.

Exch. of Pleas,
1839.

WATSON
v.
CARROLL.

to his chambers, the defendants had notice ; and it then became the duty of the defendants, as such sheriff, to discharge the plaintiff out of their custody. Breach, that the defendants did not nor would discharge the plaintiff out of their custody, but on the contrary thereof, well knowing that the plaintiff had been arrested as aforesaid, when he was privileged from arrest as aforesaid, wrongfully, maliciously, unlawfully, and injuriously, and against the will of the plaintiff, afterwards, to wit, &c., kept and detained the plaintiff in their custody for a long time, to wit, from the same day and year last aforesaid until the 28th day of September, 1838 ; whereby the plaintiff not only suffered great anguish and pain of mind and body, and was prevented from attending to his lawful affairs, but was also thereby then greatly exposed and injured in his credit, reputation, and circumstances, and was subject and put to divers expenses, to wit, to the amount of 100%, in order to obtain and in obtaining his discharge.

Pleas, 1st, not guilty ; 2ndly, that before the defendants took and arrested the plaintiff under the said writ of capias as in the declaration mentioned, to wit, on the 25th of April, 1837, one William Thomas Bailey sued and prosecuted out of the Court of Common Pleas at Westminster a capias ad satisfaciendum against the plaintiff, directed to the sheriff of Middlesex, by which her Majesty commanded the said sheriff that he should take the plaintiff, if he should be found, &c., and him safely keep, so that he the sheriff might have the plaintiff's body before her Majesty's Justices at Westminster, immediately after the execution thereof, to satisfy the said W. T. B., as well of a certain debt, &c. (stating the debt and damages recovered) ; and that he the said sheriff should have then there that writ ; which writ afterwards, and before the return thereof, and before the arrest in the declaration mentioned, to wit, on, &c., was delivered to the defend-

ants, who then and from thenceforth until, and at and after the time of their keeping and detaining the plaintiff, as in the declaration mentioned, were sheriff of Middlesex, to be executed in due form of law: and the defendants say, that afterwards, and before the return of the writ of *capias ad satisfaciendum*, and while the same remained in their possession as such sheriff, unexecuted and in force, they the defendants did (without the privity or interference of the said W. T. B.) take and arrest the plaintiff under the writ of *capias* as in the declaration mentioned; and thereupon they, the defendants, held and detained the plaintiff in their custody as such sheriff, as well under the said writ of *capias ad satisfaciendum*, as under the said writ of *capias* in the declaration mentioned, until they received notice of the said order made by the said Sir John Taylor Coleridge, as in the declaration mentioned; and that from and after the time when they received such notice of the said order, they the defendants kept and detained the plaintiff for the time in the declaration alleged, in their custody as such sheriff as aforesaid, under and by virtue of the said writ of *capias ad satisfaciendum*, the plaintiff not having been lawfully discharged therefrom, during all the time aforesaid; which are the grievances, &c. Verification.

The third and fourth pleas were similar to the second, except that they were founded on writs of *ca. sa.* sued out by other plaintiffs.

Special demurrer to each of the three special pleas, assigning for causes, that the pleas are no answer to the declaration, as the plaintiff seeks to recover damages for the malicious keeping and detaining of his body after notice of the order for his discharge, and with full knowledge by the defendants that he had been arrested when privileged from arrest, and that the order for his discharge had been made on the ground of his having been so privileged from arrest: that the keeping and detaining of the plaintiff with full notice of all the circumstances was wrongful

Exch. of Pleas,
1839.

WATSON
v.
CARROLL.

Exch. of Pleas,
1839.

WATSON

CARROLL.

and malicious; and that it was the duty of the defendants, on receiving notice of the Judge's order, and of the ground on which it had been made, to discharge the plaintiff from their custody, notwithstanding their possession of the writ of *capias ad satisfaciendum*.

Joinder in demurrer.

Stammers, in support of the demurrer.—These pleas are no answer to the declaration. The point raised in this case has never been expressly decided, but it is indirectly referred to in several cases. It is true, that it is stated in the Judge's order to be a discharge in that action only; but it is also stated to be on the ground of privilege. In *Tarlton v. Fisher* (a), it was held that a sheriff was not liable in an action of trespass and false imprisonment for arresting a privileged person; but Lord *Mansfield* puts it on the express ground of the distinction between trespass and *case*, in which "malice, or the *quo animo*, is the very gist of the action;" and he says,—“Whether, if the defendants had done any thing oppressive, with full notice of all the circumstances, an action on the *case* might be maintained, is another question.” Here the sheriff *had* full notice of the privilege, and of the order for the plaintiff's discharge on that ground. In *Stokes v. White* (b), where it was held that *case* was not maintainable by a debtor against his creditor for procuring him to be arrested while he was privileged as a witness under a subpoena, it not being shewn that the creditor had any knowledge that he was attending as a witness, when he delivered the writ to the sheriff to be executed; Lord *Lyndhurst*, C. B., refers to the dictum of Lord *Mansfield* above cited, as an authority. [*Parke*, B.—The Judge's order was notice to the sheriff that the plaintiff was entitled to his discharge in that action; but what notice is there as to the others?]

(a) Dougl. 671.

(b) 1 C. M. & R. 223.

The privilege *eundo*, &c. applies to all writs, whether of mesne or final process. [*Alderson*, B.—But the plaintiff does not take advantage of it to that extent; there are four writs against him, and he takes advantage of his privilege only as to one.] As soon as the knowledge of the privilege is brought home to the sheriff, he is bound to take notice of it to its full extent. [Lord *Abinger*, C. B.—How can he tell but that the plaintiffs in the other actions might have shewn that the party was not entitled to his discharge?] It may be that the sheriff concealed from him the fact of other writs being out against him. [Lord *Abinger*, C. B.—Then the declaration should have so alleged.] It is submitted that the plaintiff was not bound to shew it. If he was privileged from arrest on the mesne process, he must have been so also as to the other writs in the sheriff's hands. [*Alderson*, B.—There is no averment in the declaration, that he desired the sheriff to discharge him from the writs of *ca. sa.*] It is alleged that the sheriff detained him against his will, which is equivalent. [*Parke*, B.—No; it is consistent with that, that he never asked to be discharged. Surely the execution plaintiffs have a right to be heard as to whether the party ought to be discharged. *Alderson*, B.—Suppose the plaintiff in the first action colludes with the debtor, is the plaintiff in the second to be bound? *Parke*, B.—The question here is, whether it was *oppressive* conduct in the sheriff to detain the plaintiff in one action, after he had been discharged in another on the ground of privilege.]

Exch. of Pleas,
1839.

WATSON
v.
CARROLL.

Kennedy, for the defendants, (having referred to *Sharp-
lin v. Hunter (a)*), was stopped by the Court.

LORD ABINGER, C. B.—There is nothing in this case to shew that any oppression was exercised towards the

(a) 6 Dowl. P. C. 632.

Exch. of Pleas,
1839.

HOLLAND
v.
HENDERSON.

The Court, referring to *Smith v. Badcock* (a), said, that according to the practice the rule must be discharged *with costs*, unless the defendant consented to a *stet processus*.

Rule discharged with costs.

(a) 5 Dowl. P. C. 91.

ROGERS v. PETERSON and Another.

An attorney is not compellable to pay the costs of taxation, on the ground of more than one sixth having been taken off his bill, unless there have been either an undertaking by the party to pay the bill, or money brought into court, with an agreement by the party that it shall be appropriated to that purpose; since otherwise it is not within the stat. 2 Geo. 2, c. 23, s. 23.

BY a Judge's order, dated the 2nd of October, 1838, the sheriff obtained leave to pay into Court the amount of the levy made by him under a fi. fa. on a judgment in this case, to abide the event of a motion on the part of the *plaintiff*, to set aside such judgment and execution, which the sheriff accordingly did. On the 13th of October, an order was obtained for the attorney to deliver his bill of costs, to be taxed by the Master; and more than one sixth having been taken off on taxation, application was made that the plaintiff should be allowed the costs of the taxation. That application was opposed and refused on the ground that the order for taxation did not contain an undertaking to pay what, upon taxation, should be found to be due. It also appeared, that on the 5th of September, a notice had been given by Mr. Haydon (the plaintiff's late attorney) to each of the defendants not to pay any sums due on the judgment to any person but himself, as he had a lien on the judgment for his costs of the cause. *Barstow* having, on a former day, obtained a rule calling on Mr. Haydon to shew cause why he should not pay to the plaintiff the costs of the taxation,

Swann now shewed cause, and contended, that as there was no undertaking by the party to pay the bill of costs when taxed, or so much as should be found to be due, the case did not come within the statute 2 Geo. 2, c. 23, s. 23;

and therefore that the Court had no authority to order the attorney to pay the costs of taxation.

Exch. of Pleas,
1839.

ROGERS
v.
PETERSON.

Barstow, contra.—The money paid into Court stands in the place of an undertaking by the party to pay what shall be found to be due, especially after such a notice as that given to the defendants in the present case. [*Parke*, B.—If the money brought into Court was not appropriated to the payment of the bill of costs, it is not equivalent to an undertaking. The words of the statute are, that “upon submission to pay the whole sum that upon taxation shall be allowed,” the bill delivered may upon application be referred for taxation, without bringing the money into Court. The difficulty here is, to shew that this money was brought into Court for the purpose of paying the bill of costs, or, having been brought into Court, that it has been appropriated afterwards for that purpose by agreement.] It is submitted that this money is substantially appropriated to that purpose, under the circumstances of this case. The attorney gave notice to the defendants not to pay any sums due on the judgment to any person but himself, as he had a lien on it for his costs of the cause. After that, the money is brought into Court, not indeed originally for this purpose, but the Court afterwards makes an order for the attorney to deliver his bill for taxation, by which the money was substantially appropriated to the payment of the amount which should be found to be due.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be discharged, as the case is not within the statute. The money was not brought into Court originally for the purpose of settling the bill, but for another purpose, arising incidentally, and after that, it still remained so appropriated. The rule must therefore be discharged, but, I think, without costs.

Exch. of Pleas,
1839.

DOE
d.
AMLOT
v.
DAVIES.

parish of St. Mary, Cardigan, in the county of Cardigan. On the trial, at the Summer Assizes, 1838, for that county, before *Gurney, B.*, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

David James, being seised in fee of the house and garden in question, and of another dwelling-house and garden in the occupation of one David Davies, on the 10th of January, 1817, duly made and executed his will so as to pass real estates; the material parts of which were as follows:—"I give and devise all that my messuage or dwelling-house and gardens, with the rights, members, and appurtenances thereunto belonging, in the tenure and occupation of David Davies; and also all that other my messuage or dwelling-house, and garden, with the rights, members, and appurtenances, wherein I now reside, and both situate in Pendre, in the town of Cardigan, in the county of Cardigan, unto the Rev. Daniel Davies, of the town of Cardigan aforesaid, and John Mathias, of the same place, malster, and their heirs; to have and to hold the same hereditaments, with their and every of their rights, members, and appurtenances, unto the said Daniel Davies and John Mathias, and their heirs, in trust to and for the several uses, intents, and purposes, and under and subject to the several powers, limitations, and agreements, in this my will mentioned, limited, and declared of and concerning the same, that is to say: upon trust that they the said Daniel Davies and J. Mathias do and shall pay and apply the rents, issues, and profits thereof, and of every part thereof, unto my dear wife Margaret James, yearly and every year during so long a time as she shall remain my widow; and from and after the determination of that estate, to the use and behoof of all and every of my child or children by my said wife Margaret James, equally to be divided between them, share and share alike, and the lawful issue of their or her or his bodies or body, for ever; and for default of such issue, to the use

and behoof of my nephew David James, son of Evan James, late of Vagurenion, deceased, his heirs and assigns for ever. I give, devise, and bequeath unto my daughter, Frances James, the sum of 300*l.*, to be paid her when she attains the age of twenty-one years, and the house where she now lives, after the decease of her mother, or the day of intermarriage. Also I give, devise, and bequeath unto my daughter, Rachel James, the sum of 300*l.*, when she attains the age of twenty-one years, and the house now in the occupation of Mr. David Davies, after the decease of her mother, or the day of intermarriage: and in case of either of my daughters aforesaid dying without lawful issue before the said sum or sums are paid, then the share or shares of her or them so dying to be divided amongst the survivors or survivor of them."

Exch. of Pleas,
1839.

DOE
d.
AMLOT
v.
DAVIES.

The testator died in November, 1821, without having altered or revoked his will, leaving his wife Margaret, and two children only, viz. the daughters of him and his said wife Margaret, mentioned in his will, surviving him. The house and garden and premises in question, are the house and premises devised in the former part of the will, as the house in which the testator then resided; and in the latter part of the will, as the house wherein his daughter Frances James lived.

Margaret James, the testator's widow, on his death, took possession of both the houses and gardens mentioned in the will, and continued in the receipt of the rents and profits thereof until her death, which happened on June 1st, 1833.

At the time of the making of the will, the testator was aged fifty-three years, and his wife Margaret was aged forty-five years.

On the death of the widow, the testator's daughter Frances, who attained her age of twenty-one years on the 20th of September, 1828, and who, between the dates of the death of her said father and mother, namely, on the

Exch. of Pleas,
1839.

DOE
d.
AMLOT
v.
DAVIES.

10th of December, 1829, had married the defendant Rees Davies, took possession of the house and garden and premises in question; and the testator's daughter Rachel, (who, on the 3rd of August, 1833, married Thomas Amlot, the lessor of the plaintiff), took possession of the house and garden described in the will as the house and garden in the occupation of David Davies. The testator's daughter Frances died in the month of October, 1833, leaving her husband and their only child Hannah, her surviving. Hannah died on the 15th of October, 1836, an infant and unmarried. The day of the demise laid in the declaration is January 2nd, 1837. Daniel Davies, the lessor of the plaintiff, is the devisee in trust mentioned in the testator's will. John Mathias, the other trustee, died many years ago. The houses mentioned in the former and latter part of the will are the same.

The question for the opinion of the Court is, whether, on the construction of the will, the plaintiff was entitled to recover in this ejectment.

E. V. Williams, for the lessors of the plaintiff.—On the proper construction of this will, an estate is given to the wife during her life or widowhood, with remainder, as to the house and premises in question, to the testator's daughter Frances for life, with remainder to the testator's children as tenants in common in tail, with remainder to the nephew in fee. On the death of the widow, therefore, Frances became possessed as tenant for life, with remainder to herself and her sister as tenants in common in tail; as to one undivided moiety, the two estates coalesced by way of merger, and Frances became tenant in tail as to that moiety, with an estate for life in the other; on her death, her husband became tenant by the curtesy as to the former moiety, and the other sister, Rachel, became tenant in tail in possession of the latter. The only apparent difficulty is, that the earlier part of the will purports to

devise the two houses in terms which would give an estate tail to all the children, whereas, by the subsequent clause, they are given to the two daughters in severalty, without any words of limitation. [*Parke, B.*—It is not difficult to conjecture what the testator meant—to leave one house to one daughter in tail, the other to the other in tail.] If so, *quod voluit non dixit*: the Court cannot legally deduce such an intention from the words of the will. There are two principles laid down as to the interpretation of wills, both of which are applicable here. First, effect must be given, if possible, to every word in the will; and therefore, if it contain two dispositions of the same property, they must be reconciled, if possible, and some effect given to both; if there be a partial inconsistency between them, the one qualifies the other. Here the testator first gives a tenancy in common in tail to all his children; then, in the subsequent clause, he gives a house to each daughter, without words of limitation; i. e. life estates in each: in order, therefore, to give effect to both, this latter devise should be read as coming before the devise in tail, i. e. so as to give estates for life to each in severalty, with remainder to all the children as tenants in common in tail. The rule is thus stated by Mr. Jarman, in his edition of *Powell on Devises*, Vol. 1, p. 363, where the cases are collected:—"The rule that gives effect to the latter part of a will, to the subversion of the former, is never applied but on the failure of every attempt to give the whole such a construction as will render every part of it effective. In the accomplishment of this object, the local order of the clauses or limitations will be disregarded, provided the Court can, by the transposition of them, deduce a consistent disposition from the whole." Another principle is, that a devise is not to be construed exclusively with reference to the present state of circumstances, but regard is to be had to other circumstances, under which the Court might be called upon to construe the limitations. Now here it appears that

Exch. of Pleas,
1839.

DOE
d.
ANLOT
v.
DAVIER.

Exch. of Pleas,
1839.

DOE
d.
ANLOT
v.
DAVIES.

there are no other children but the two daughters, and that they both survived the testator: and it may therefore be said that he intended only his daughters who were then living to take. But the gift is not only to all and every his child or children, but also "to the lawful issue of their, *his*, or her bodies or body." It will be said that the word "his" must be rejected; but that would be wholly inconsistent with the expressed view of the testator. [*Parke, B.*—The clause contemplates an after-born son.] In *Chambers v. Brailsford* (a), Lord *Eldon* says: "The rule is, that words are not to be rejected unless you cannot by any possibility give them a rational construction." Here an obvious construction may be given to the word "his." Can it be said, if the testator had afterwards had a son born, that he would not share with his sisters? Or suppose the daughters had died, leaving him surviving, could it be said the estate would go over to the nephew? [*Lord Abinger, C. B.*—We clearly cannot construe the devise on the ground that the testator intended to limit it to these two daughters.] The argument, then, on the other side must be, that the latter devise to the daughters in severalty imports a fee, and is a revocation of the first; but that is in contravention of the rule of law already stated. [He then argued that the estates for life and in tail in *Frances's* moiety would coalesce in the same manner as in an entirety; and cited 1 *Prest. Estates*, 321; 2 *Roll. Abr.* 417, *Remainder*, (G), pl. 6; 18 *Vin. Abr.* 392, pl. 6.]

J. Wilson, contra.—The propositions of law laid down on the other side, as to the rules for the construction of wills, are not disputed: a further rule is also laid down in the work already cited, viz., that "where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent

(a) 19 *Ves.* 652.

urpose." (a) And again—"All the parts of a will are to be construed in relation to each other, and so as, if possible, form one consistent whole; but where several parts are absolutely irreconcilable, the latter will prevail." (b) Here is contended, first, that the testator must be considered having intended by the first devise to give an estate in severalty in each house to each daughter; but if not, that by the subsequent clause he gives an estate in fee to each in each. If the question depended solely on the words of the former clause, it would be clear that they took an estate as tenants in common in tail, by force of the words "equally to be divided;" *Fisher v. Figg* (c). But in the subsequent part of the will, the testator shews how he means that this "equal division" could be made; viz., by giving a house to each. Suppose he had said "equally to be divided between them, viz., one house to Frances, and one to Rachel," he would have shewn clearly that he did not mean, to be divided by a bill for a partition; and the terms of this will are in effect the same. The subsequent clause explains also what he means by the words "all and every of my child or children," viz., his two daughters. As to the word "his," the court, looking to the latter part of the will, should reject it. It may be observed, that this is not the only verbal inaccuracy—the words "survivors of" the two daughters are also clearly inaccurate. On the argument urged for the plaintiff, one leading principle by which the testator was governed, viz., equality of division, must be violated; hence, if it be well founded, the issue, if there had been any, of the deceased daughter, would get three-fourths of the property, viz., one house as tenant in tail, and half of the other by this ejectment. In *Atkins' Case* (d), a tes-

Exch. of Pleas,
1839.

DOE
d.
AMLOT
v.
DAVIES.

(a) 2 Pow. Dev., by Jarman, 7;
Jenkins v. Herries, 4 Madd.
2.

(b) *Id.* 5.

(c) 2 P. Wms. 14; *Ld. Raym.*
622; 1 Salk. 391; 3 Salk. 206;
12 Mod. 296; *Com.* 88.

(d) *Moore*, 593.

Exch. of Pleas,
1839.

DOE
d.
AMLOT
v.
DAVIES.

tator devised to John Atkins and the heirs of his body, and in a subsequent clause said, "Item, I will that after the decease of my son John, my land shall remain to George, son of John:" and it was held that John had an estate tail notwithstanding the latter words. The construction adopted on the other side is most inconvenient: the plaintiff admits that each daughter is entitled for life to a separate house; but as soon as one of them dies, the testator's implied declaration that he so distributed them as being of equal value, is annulled, and recourse must be had to an ejectment or a bill in equity.

But, secondly, by the latter clause of the will an estate in fee, and not for life only, is given in each house. It is to be observed that it is a gift of money and land together; and the testator then declares, that "in case of either of his daughters aforesaid dying without lawful issue, before the said sum or sums are paid, (that is, under twenty-one,) then the *share or shares* of her or them so dying to be divided amongst the survivors or survivor of them." Now the words "share or shares" would comprehend the real estate before given to them, as well as the money; *Doe d. Stopford v. Stopford* (a); and if an estate be limited over on the death of the devisee under twenty-one, that enlarges the devise to a gift in fee simple, by implication that it is to go over in that event only. [*Parke, B.*—Does not the context here shew that the words "share or shares" apply to the money only?] They are words not properly applicable to a gift of specific sums to each legatee. In *Doe v. Stopford*, there were pecuniary bequests to which the word "share" might strictly and technically apply, yet it was held to include leasehold property also. *Hardman v. Johnson* (b), and *Doe d. Gibson v. Gell* (c), are decisions to the same effect on similar words. [*Alderson, B.*—The words

(a) 5 East, 501.

(b) 3 Meriv. 347.

(c) 4 D. & R. 337; 2 B. & Cr. 680.

"share or shares" here are also inaccurate, because certainly each had but one share.] *Exch. of Pleas, 1839.*

Williams, in reply, was stopped by the Court.

DOE
d.
AMLOT
v.
DAVIES.

LORD ABINGER, C. B.—Whatever may have been the intention of the testator, we are bound to collect it from the words of the will: and the construction must be just the same as if he had left more children, and more property. He first devises his two houses to his wife for life, with remainder to all and every his child and children, equally to be divided between them, in tail; and afterwards devises to one daughter one of the houses, and to the other the other, without any words of limitation. Taking the whole will together, as we are bound to do, the effect is, that there is a devise to the wife for life, then an estate for life to each of the daughters in one house, with remainder in the whole to the children of the testator as tenants in common in tail. The consequence is, that the plaintiff is entitled to recover a moiety of the house which is in the possession of the defendant.

PARKE, B.—I entirely concur. If we were at liberty to substitute conjecture for the words of the will, I should certainly consider it most probable, that the testator intended to give a house to each of his daughters and their respective issue. But our duty is not to decide upon conjecture, but to construe the words, adopting certain recognised rules of construction. Now, adopting the rule which has been properly applied by Mr. *Williams*, that we are to make all the parts of the will reconcileable if possible, I think we may in this case make the whole consistent; viz., by giving an estate for life in severalty to each of the daughters in one house, with remainder in both of them to the two, as tenants in common in tail. Effect is thus given to every word in the will; and so

Exch. of Pleas,
1839.

DOE
d.
AMLOT
v.
DAVIES.

construing it, the consequence is, that the plaintiff is entitled to recover a moiety of the house devised to Frances.

ALDERSON, B., concurred.

Judgment for the plaintiff.

HETHERINGTON v. ROBINSON.

By agreement of reference, a cause was referred to two arbitrators, with power to appoint an umpire, the costs of the cause to abide the event; and the said parties thereby bound themselves to stand to, obey, and keep the award "of the said two arbitrators and their umpire, so as the award of the said arbitrators and their umpire was made before a certain day." An award was made by the two arbitrators only, and they found two issues for the plaintiff and one for the defendant, and directed that "the costs of the said cause, and of the several issues found therein, shall be paid to the plaintiff, or to the party entitled thereto:"—*Held*, on motion for an attachment, that the validity of the award, being made by the two arbitrators only, was too doubtful to grant an attachment upon it; and 2ndly, that it was void as to the adjudication of the costs of the cause.

BY an agreement of reference, the matters in dispute in this cause were referred to two arbitrators, with a power to them to appoint an umpire. It was also agreed that the costs already incurred should abide the event of the award, and the costs of the reference should be in the discretion of the arbitrators; and that the parties, and each of them, "should and would well and truly stand to, obey, abide by, perform, fulfil and keep the award of the two arbitrators and their said umpire, so as the award of the arbitrators and their umpire were made before the 1st day of September next." An award was made, signed by the two arbitrators, but not by the umpire, nor did it appear that an umpire had ever been appointed. There were three issues on the record, and the arbitrators found two in favour of the plaintiff, and one in favour of the defendant, and directed "that the costs of the said cause, and the several issues found therein, should be paid to the plaintiff, or to the party entitled thereto."

Wightman having obtained a rule nisi for an attachment for non-performance of the award,

W. H. Watson shewed cause.—This award cannot be enforced. First, because it is only the award of the two arbitrators, and the parties were to have the judgment of the *two arbitrators and their umpire*. Though the word “umpire” is used, yet the third party is in fact an arbitrator, and the award must be made by the three. It does not even appear that any umpire was ever appointed.—He cited *Hughes v. Garnett* (a) as in point.

Exch. of Pleas,
1889.

HETHERING-
TON
v.
ROBINSON.

Secondly, the arbitrators had no power over the costs of the cause, but they have nevertheless adjudicated upon them. [*Parke, B.*—There is nothing in that objection; the award will be void as regards those costs, which will follow the law.]

Wightman, contra.—The cause is referred to two persons, who are named, and their umpire. The meaning of “umpire” is a person who is to decide between them in case of difference. There is nothing to shew that they were to appoint him before entering on the arbitration, but only in case they differed. There is no time at all mentioned for his appointment.

PARKE, B.—The words of the agreement are not that the arbitrators *or* their umpire, but that they *and* their umpire, shall act in the matter. If the word “or” had been in the place of “and,” your construction might prevail. It is much too doubtful to grant an attachment upon.

ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

(a) *Watson on Awards*, 72.

Exch. of Pleas,
1839.

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When a plaintiff, suing in formâ pauperis, succeeds upon one of several issues, the defendant is not entitled to any set-off in respect of the costs of other issues found for him.

Semble, that the admission of a party to sue in formâ pauperis, after the commencement of the suit, is improper, such admission being in contravention of the stat. 23 Hen. 8, c. 15, s. 2.

FOSS v. RACINE, LONG, HARRISON, and WILLIAMS.

THE plaintiff having been admitted to sue in formâ pauperis, obtained a verdict on the first issue in the action, against all the defendants except Williams, the defendants succeeding on the other issues. The Master taxed the plaintiff his whole costs on the issue found for him, without deducting the costs on the issues found for the defendants. It appeared that the order for the admission to sue in formâ pauperis was not obtained until after the declaration had been delivered.

Platt moved for a rule to shew cause why the Master should not review his taxation, on the ground that the costs of the issues found for the defendants ought to have been deducted or set off against the plaintiff's costs. He referred to the statutes 11 Hen. 7, c. 12, and 23 Hen. 8, c. 15, and contended that this was not the case of a nonsuit or verdict against the plaintiff, within the first section of the latter statute, nor was [the plaintiff here called upon to pay costs, but only not to receive them.

SED PER CURIAM.—In *Gougenheim v. Lane (a)*, it was held that the rule of H. T. 2 Will. 4, c. 74, did not apply to paupers, and that the costs of such of the issues as were found for the opposite parties could not be deducted from the plaintiff's costs of the cause. If the plaintiff were compelled to set off and deduct the costs of the opposite parties against his own costs, it would amount to the same thing as paying them. A liability to a set-off can only arise where there is a liability to pay. The officer, in taxing these costs, ought to allow such briefs, witnesses, and fees, as if the count on which the plaintiff succeeded had been the only count in the declaration.

(a) 1 M. & W. 136.

On a subsequent day the case came again before the Court, on a motion by *Platt* that the Master should review his taxation, and disallow the plaintiff the whole of his costs, or at least a certain part of them, on the ground that the Master had allowed the court and office fees, the sum recovered having been under 5*l.*, and also that he had allowed the full fee to counsel. It appeared, however, that the court and office fees had been paid at the express suggestion of the defendant's attorney, and that a proportionate deduction in the counsel's fee had been made on taxation. These grounds were therefore considered insufficient to support the application. A difficulty, however, occurred to *Parke*, B., viz. that the plaintiff had been admitted to sue in formâ pauperis after plea pleaded, and not at the commencement of the suit, as required by the 23 Hen. 8, c. 15, s. 2, which exempts pauper plaintiffs from the payment of costs, where, at the commencement of their suit, they shall be admitted at the discretion of the judge or judges to sue as such.

Exch. of Pleas,
1839.

Foss
" RACINE.

Murphy shewed cause.—In this case application was made to a learned Baron at Chambers to dispauper the plaintiff, but he refused to do so, and referred the parties to this Court; but no application was made, and it is now too late to do so. [*Parke*, B.—The statute provides that the rule for the admission to sue in formâ pauperis shall be obtained before the commencement of the suit: and if that application is not made in time, there ought to be security given for the costs incurred in the meantime.] In *Jones v. Peers* (a), where an order was made pendente lite, admitting the plaintiff to sue in formâ pauperis, and an application for security for the costs previously incurred was not made until nearly two years afterwards, the Court refused the application, and allowed a retrospective ope-

(a) M'Clel. & Yo. 282.

Exch. of Pleas,
1839.

Foss
v.
RACINE.

ration to the order. And in a note to that case the practice is stated to be, that an absolute order of admission is made without any previous security being required; but on service of the order on the defendant's solicitor, he may proceed, if he thinks fit, to compel the usual security.

Platt, contra.—The law is, that a plaintiff is not to be admitted to sue in formâ pauperis after the commencement of the suit. The judgment of the Court in the case cited proceeds upon the ground of the great lapse of time which had taken place after the service of the order, before an application was made for security: and *Graham, B.*, in delivering the judgment of the Court, says:—"This order is nearly of two years standing, and therefore the adverse party must have been apprized of it nearly two years ago, and it was his duty to resist it then, if resistance was intended."

PARKE, B.—The difficulty is to see how we are to get over the words of the act of parliament, that the plaintiff must be admitted to sue in formâ pauperis before the commencement of the action. The act expressly requires the order to be so made, and therefore the plaintiff ought never to have been admitted to sue in formâ pauperis.

Terms were then proposed and acceded to, viz., to allow the defendant his costs up to the time when the plaintiff was admitted to sue in formâ pauperis, and that the rule should be discharged as to the rest.

Exch. of Pleas,
1839.HAWKINGS *v.* NEWMAN.

BT for penalties under the Gravesend Pier Act 3 & 4, c. 101, s. 19. The declaration stated, that one W. A. C. was appointed by the Mayor, Aldermen, and Burgesses of the villages and parishes of Gravesend and Milton as clerk for the purposes of the said act, and one I. H. was appointed treasurer for the same purposes: and that the defendant was the clerk of the said W. A. C. Yet the defendant, not regarding the said act, whilst he was such as aforesaid, officiated for the said treasurer, contrary to the said act.

Verdict, not guilty.

At the trial before *Patteson, J.*, at the last Summer Assizes for the county of Kent, the plaintiff, after proving that W. A. C. was the clerk appointed by the Mayor, &c., of Gravesend and Milton, for the purposes of the act, that the defendant was his clerk, and that I. H. was treasurer, &c., as alleged in the declaration, for the purpose of shewing that the defendant had officiated for the treasurer, contrary to the 19th section of the above-mentioned act, put in evidence the corporation accounts, containing the following item:—"Salary to W. Newman, assistant-treasurer;" also an admission by the defendant in the trial of an appeal, that he was "assistant-treasurer," and several receipts for pier-tolls filled up by the defendant and signed by the treasurer, and one receipt for pier-tolls, signed by the defendant thus:—"W. Newman, assistant-treasurer." At the close of the plaintiff's evidence the counsel for the defendant submitted to the Judge, that the corporation had the power of appointing the defendant assistant-treasurer under the

By the Gravesend Pier Act (3 & 4 Will. 4, c. 101, s. 18), the corporation are empowered to appoint clerks, treasurers, collectors, and such other officers or assistants as they may think necessary for the purposes of the act. By sect. 19, it is provided that it shall not be lawful for the corporation to appoint the person who may be appointed the clerk in the execution of the act, the treasurer for the purposes of the act; and a penalty is imposed on any person, being the clerk, or his partner or clerk, who shall in any manner officiate for the treasurer:—*Held*, that, by the latter section, the corporation were prohibited from appointing the clerk to such officer as assistant treasurer; but where the corporation had so appointed the clerk, and he had discharged

the duties of the treasurer, *held*, that it was a question for the jury, whether he did so bona fide in the belief that he was legally appointed by them as an independent officer, or colourably in evasion of the act; and that, in the former case, he would not be liable to the penalty for acting as treasurer, but in the latter he would.

Exch. of Pleas,
1839.

HAWKINGS
v.
NEWMAN.

18th section, and that having been so appointed, he could not be said to “ officiate for the treasurer,” as he was discharging the duties of an independent officer, and officiated for himself. The learned Judge thereupon nonsuited the plaintiff, but gave him leave to move to set aside the nonsuit, and enter a verdict for the penalty, if the Court should be of opinion that the plaintiff was entitled to recover, under the construction of the several clauses of the act.

By the 18th section of the act 3 & 4 Will. 4, c. 101, it is enacted “ that it shall be lawful for the said mayor, jurats, and common councillors from time to time to nominate and appoint one or more person or persons to be their clerk or clerks, treasurer or treasurers, collector or collectors, of the rates, tolls, and duties to be levied, raised, and received under or by virtue of this act, and *such other officers or assistants* as the said mayor, jurats, and common councillors shall think necessary for the execution of the several purposes of that act and the recited act; and the said mayor, jurats, and common councillors shall and may from time to time remove or suspend any of such officers as they shall see occasion, and appoint another or others in the room or instead of any of them who shall be so removed or suspended, or who shall die, neglect, refuse, or decline such offices, or become incapable of acting therein; and out of the monies to be raised by the said recited act and this act, to pay such wages, salaries, or other allowances to the said officers respectively, as to the said mayor, jurats, and common councillors shall seem reasonable.” By a proviso in the 19th section, it is further enacted, “ that it shall not be lawful for the said mayor, jurats, and common councillors, to appoint the person who may be appointed the clerk in the execution of this act, or the partner of any such clerk, or the clerk or other person in the service or employ of any such clerk or of his partner, the treasurer for the purposes of this act, or to appoint

any person who may be appointed treasurer, or the partner of any such treasurer, or the clerk or other person in the service or employ of any such treasurer or of his partner, the clerk to the said mayor, jurats, and common councillors for the purposes of this act; and if any person shall accept both the offices of clerk and treasurer for the purposes of this act and the said recited act, or if any person being the partner of any such clerk, or the clerk or other person in the service or employ of any such clerk, or of his partner, shall accept the office of treasurer, or shall act as deputy of the treasurer, or in any manner officiate for the treasurer, or being the partner of any such treasurer, or the clerk or other person in the service or employ of any such treasurer or of his partner, shall accept the office of clerk in the execution of this act, and the said recited act, or shall act as deputy of such clerk, or in any manner officiate for such clerk, every such person so offending shall, for every such offence, forfeit and pay the sum of one hundred pounds to any person who shall sue for the same."

Exch. of Pleas,
1839.

HAWKINGS
v.
NEWMAN.

Thesiger, in Michaelmas Term last, obtained a rule to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for the amount of the penalty, pursuant to the leave reserved.

D. Pollock and *Brett* now shewed cause. The 18th section of the act confers upon the corporation of Gravesend the power of appointing a treasurer, collector, and such other officers or assistants as they may think necessary. They had, therefore, the power of appointing an assistant treasurer." The prohibitory part of sect. 19 does not prevent the corporation from appointing the clerk to the pier clerk to the office of *assistant* treasurer; it prohibits the appointment of the clerk to the pier clerk to the office of *treasurer* only. This the corporation has

Exch. of Pleas,
1839.

HAWKINGS
v.
NEWMAN.

not done, as I. H. was proved by the plaintiff to be the treasurer appointed for the purposes of the act: it was the defendant's duty to assist the treasurer in some of the subordinate parts of his office. Even if the word "assistant," in the 18th section, does not shew that the corporation could legally appoint an assistant to the treasurer, they have clearly the power of appointing a treasurer or treasurers, or such other officers as they think necessary; and they have exercised the power vested in them by this section, by appointing as a distinct officer an "assistant treasurer," who is wholly independent of the treasurer, and receives a salary from the corporation as a distinct officer. The defendant, as assistant treasurer, appointed by the corporation, performs the duties of his own office in like manner as an assistant overseer appointed under the 59 Geo. 3, c. 12, s. 6. The assistant overseer performs a portion of those duties which would otherwise be performed by the overseer: so the defendant may discharge some portion of those duties, viz., collecting the tolls, which might form a part of the treasurer's duty if there were no assistant. No doubt the corporation might, under the 18th section, have appointed the defendant "collector." If, then, they had the power of appointing an assistant treasurer under section 18, and the prohibitory part of the 19th section does not prevent them from appointing the defendant to that office, how can it be contended that the defendant, by discharging the duties of his own office, to which he has been legally appointed, can be liable to this penalty as having officiated for the treasurer, while in fact he was merely performing the duties which his own appointment imposed on him?

Thesiger and Platt, contra.—The corporation has no power to appoint an assistant treasurer under section 18, though they may appoint two treasurers. If the defendant could hold the office of assistant treasurer, and perform

the duties of treasurer, the evident object of the act would be defeated, which was to keep the offices of treasurer and pier clerk perfectly distinct. The defendant was not in possession of a distinct office, he was merely the clerk to the treasurer. The case resembles that of *Ex parte Harvey* (a), in which the Court of Queen's Bench said that it was as impossible to hold, that the place of assistant chamberlain was an office within the 5 & 6 Will. 4, c. 76, as to say that if the corporation had recommended the chamberlain to employ a clerk, that clerk would have had such an office. An assistant overseer is so styled in the 59 Geo. 3, c. 12, s. 6: but the term assistant treasurer does not occur in this act—no such officer is recognised by it. The acts proved to have been done by the defendant were clearly such as the treasurer would be called upon to do, and by performing which, under the name of assistant treasurer, the defendant has officiated for the treasurer, and is therefore liable to the penalty imposed by the 19th section of the act.

Exch. of Pleas,
1889.

HAWKINGS

NEWMAN.

LORD ABINGER, C. B.—If we were to direct a verdict to be entered for the plaintiff, it would exclude an inquiry into a point which we are disposed to think the learned Judge ought to have left to the jury. If the learned Judge had left the question to the jury, and they had found for the plaintiff, we think it would have been a proper verdict; but the learned Judge having been interrupted on a question of the construction of the act, the question of bona fides never was submitted to them. I think there was abundant evidence to find that the defendant acted for the treasurer, and that he did so knowingly and in evasion of the act of Parliament; but the jury were to judge of that, and it was for them to draw the inference one way or the other on that point. The jury might think

(a) 7 Adol. & E. 739; 3 Nev. & P. 159.

Exch. of Pleas,
1839.

HAWKINGS
v.
NEWMAN.

that the defendant acted *bonâ fide*, and with no intention to evade the act, and might come to a different conclusion to that which I do. Under these circumstances, I think the rule ought to be absolute for a new trial, but not to enter a verdict for the plaintiff.

PARKE, B.—I am of the same opinion. The learned Judge seems to have been of opinion, at the trial, that it was in the power of the corporation of Gravesend to appoint as a substantive officer an assistant treasurer, which assistant treasurer would act on his own account, and would be responsible in his own person for all the monies he would receive; and acting on that supposition, he has directed a nonsuit to be entered. Now the question in this case depends on the construction of the act of Parliament,—whether the corporation have any power to appoint an assistant treasurer as a substantive officer. If they had that power, it would enable them to commit a complete fraud on the act of Parliament, and to defeat the object of it altogether. The corporation, under section 18, may appoint any number of treasurers that in their discretion they may think right, and also such other officers *or assistants* as they may think necessary for carrying into execution the several purposes of the said act. The word *assistant* seems to me merely to be another name for officer; they are to be officers or assistants to the corporation, not assistants to other officers, and the corporation has no right to give an assistant a salary, except as an officer. There are many other officers mentioned in the 18th section, which shews clearly to my mind that the term assistant is used merely as a synonyme for officer. It then goes on to say, that the corporation may remove or suspend any of such officers as they shall see occasion, and appoint another or others in the room of any of them who shall be so removed &c., and out of the monies to be raised by the act, pay such wages, salaries, or other

allowances to the said officers respectively, as to the said mayor, &c., shall seem reasonable. Therefore they have no power to give any salary to any assistant at all, except as synonymous with an officer; they had no power at all to appoint as a substantive officer an assistant treasurer; although they may appoint two treasurers if they please. Then the question arises, whether, in this case, the defendant is guilty of having officiated for the treasurer; and I think he cannot be so considered, unless he knowingly and wilfully executed part of the duty cast on the treasurer in virtue of his office; if he did, he would be guilty. If he acted bonâ fide under the belief that he was a substantive officer appointed by the corporation, and really meant to execute his own duties, and not the duties of the treasurer; if that really was the case, he would not be liable to this penalty. It was a question for the jury whether this was a mere contrivance on the part of the corporation to appoint an assistant to the treasurer, to manage his duties under the name of assistant treasurer, or not; if that was the case, it is impossible to suppose the defendant was not privy to it, and then his purporting to act as an independent officer would be illegal; but if, in what he did, he acted bonâ fide under the belief that he was really an independent and legal officer, in that case he is not guilty of this offence. That is a point which I think ought to be submitted to the jury; if it had been so left, and they had found for the plaintiff, I should have been satisfied with their finding.

Exch. of Pleas,
1839.

HAWKINGS
v.
NEWMAN.

ALDERSON, B.—I am of the same opinion. It seems to me that when the learned Judge expressed his opinion as to the fact that the defendant was acting on his own behalf, he expressed an opinion which ought to have proceeded from the jury; but we cannot accede to the proposition that because the learned Judge has given an erroneous opinion, this Court is to allow a verdict to be entered

Exch. of Pleas,
1839.

HAWKINGS.

v.
NEWMAN.

against the defendant, on the ground that the jury would have found a verdict otherwise, if the Judge had asked their opinion, as he ought to have done. I think there was abundant evidence to shew that this party was officiating for the treasurer, for I quite concur with the rest of the Court in thinking that this act of Parliament gives no power to the corporation to appoint an assistant treasurer; the words "*officers*" and "*assistants*" are synonymous, and apply to officers who are to assist in the execution of the purposes of the act. I have no doubt in my own mind that the corporation had no power to appoint an assistant treasurer; nevertheless, the word *assistants* contained in the 18th clause of the act, may have misled both the corporation and the defendant, and the corporation may bonâ fide have appointed, and the defendant may bonâ fide have acted in that capacity. If they thought, though we do not, that the act of Parliament empowered them to create this officer, and if he has been bonâ fide appointed, and has bonâ fide assumed the office of assistant treasurer, he ought not to be found guilty. Although we are of opinion that they had no power under the act to appoint this defendant to the office of assistant treasurer, there being no power to appoint as a substantive officer, one who was to do the duties of another person who has another substantive and different office; yet, if the jury had come to the conclusion, upon the whole case, that it was a bonâ fide transaction, they ought to have found for the defendant. On the other hand, if there was evidence to shew that it was a colourable transaction, and if they were of that opinion, they would be bound to find for the plaintiff.

PARKE, B., added,—If any other construction were to be put on the word "*assistants*," it would enable the corporation completely to defeat the object of the clause; they may appoint two treasurers if a necessity for such an appointment should exist; but to say they shall appoint an

assistant treasurer is to allow them to defeat the intention of the clause altogether. *Exch. of Pleas, 1839.*

Rule absolute for a new trial.

HAWKINGS

v.
NEWMAN.

HOPKINS v. THE MAYOR, ALDERMEN, and BURGESSES OF SWANSEA.

DEBT.—The declaration stated, that the borough of Swansea, in the county of Glamorgan, was an ancient Declaration in debt against the corporation of S. stated,

that in the year 1762 an act of Parliament passed for dividing and inclosing two pieces of open land in the borough, over which the corporation had immemorially exercised the sole right of pasturage, and enacted that they should be divided between and allotted to the lord of the manor and the corporation in certain shares, and that the corporation should have power, from time to time, to make leases of the allotments so vested in them, for such terms, and with such covenants and agreements, as the burgesses in common hall assembled should think proper. The declaration then set forth a "rule, order, and ordinance" of the burgesses in common hall assembled, made on the 1st of April, 1762; whereby, after reciting that they were of opinion that the most beneficial mode for the corporation of inclosing the lands would be to grant leases of them for long terms to such burgesses as were willing to take the same, under covenants to inclose them, it was ordered, that no lease should be made to one burgess in the same lease of more than fifty or less than five acres; and "it being their desire and opinion that every burgess residing within the borough should receive a benefit from the said inclosure," it was further ordered, that certain annual sums out of the rents arising from the inclosure should be paid and distributed yearly, by the common attornies of the borough for the time being, on every 2nd of November, among the twelve senior burgesses residing within the borough; and that no burgess who should take a lease should be entitled to receive any of such money. The declaration then stated the granting of the leases; that the plaintiff, after the passing of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, viz. for a year ending 2nd of November, 1836, was one of the twelve senior burgesses; that the defendants had received from the rents of the land sufficient to satisfy the sums so ordered to be paid; and that the office of common attorney was abolished by that statute.

Plea, that on the 2nd of November, 1836, the defendants necessarily, and as they were legally required and bound to do, paid and applied all the rents of the said lands, together with and amongst other rents and sums of money, in payment of certain lawful debts then due and owing to divers persons from the defendants, in their corporate capacity, out of the property of the borough, and by law then payable in priority and preference to the payments to the twelve senior burgesses, or any of them.

Replication, that on the 2nd of November, 1836, a surplus annual income from the said rents, and from other property of the borough, belonging to the defendants in their corporate capacity, remained to the defendants, wherewith to pay the annual sums before mentioned, after payment of the interest of all lawful debts chargeable on the land so allotted as aforesaid, together with the salaries of municipal officers, and all other lawful expenses which, on the 5th of June, 1835, were chargeable on the same.

Held, 1st, that the declaration was good; for,

(1.) That the ordinance of 1762 was a valid bye-law;

(2.) That an action of debt was maintainable on it at common law, by the parties to whom pecuniary benefits were granted by it;

(3.) That under the 5 & 6 Will. 4, c. 76, s. 2, such action was maintainable against the corporation at large.

Held, also, that the plea was bad on general demurrer, as not shewing that there existed no surplus rents for the purpose of making the payments to the burgesses, after payment of the interest of debts chargeable on the particular lands.

Seemle, that the plea was bad also, as not shewing with sufficient distinctness that the debts, in respect of which the rents had been applied, existed at the time of the passing of the statute 5 & 6 Will. 4, c. 76.

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

borough, and the burgesses thereof, until the time of the passing of the statute 5 & 6 Will. 4, c. 76, (the Municipal Corporation Act), and until the first election of councillors of the borough under the said statute, had been a body corporate and politic by the name of mayor, aldermen, and burgesses of the borough of Swansea, and from thence hitherto, according to the form of the said statute, have been and still are a body politic and corporate, by the name of the mayor, aldermen, and burgesses of the borough of Swansea; and that from time immemorial up to and until the time of the passing of the said statute, the burgesses of the said borough, in common hall assembled, had been and were the acting part of the said corporation, and had had the disposition and ordering of all and singular the estates, property, revenues, and income thereof; and that before the passing of the said statute, to wit, in the second year of the reign of the late King George the Third, an act of Parliament was passed, entitled "an act for dividing and inclosing two pieces or parcels of open and uninclosed lands, called the Town Hill and the Borroughs, in the borough and manor of Swansea, in the county of Glamorgan," by which said last mentioned act of Parliament, after reciting that the said burgesses of the said borough, in their corporate capacity, had from time immemorial had and enjoyed the sole right of depasturing of certain open and uninclosed parcels of land, called the Town Hill and the Borroughs, and the cutting of furze and fern, and other profits growing and arising from the surface of the same; and that the said open and uninclosed parcels of land were in their then present situation capable of improvement, and that it would be of great advantage to Henry, then Duke of Beaufort, who was then seised in fee of the same as the lord of the said borough and manor of Swansea, and to the said burgesses, if the same were divided and inclosed, but that such division and inclosure could not effectually

be made and established without the authority of Parliament; it was by the said last-mentioned act of Parliament enacted, that from and immediately after the passing of the same, the said two parcels of open and uninclosed land, called &c., should be divided between and allotted to the said Henry, then Duke of Beaufort, his heirs and assigns, and the said burgesses of the said borough of Swansea and their successors, in their corporate capacity, in the manner, shares, and proportions thereafter mentioned, that is to say. [The declaration then set out the allotments, giving part of the Town Hill to the Duke of Beaufort, and the other part of the Town Hill, and all the piece of land called the Borroughs, to the burgesses and their successors, which were vested in them in their corporate capacity for ever, saving certain rights of the Duke of Beaufort to mines &c.] And by the said last-mentioned act it was further enacted, that it should be lawful for the said burgesses and their successors in their corporate capacity, to make and execute under their common seal, from time to time, valid and effectual leases of the said allotments thereby vested in them, or any part or parts thereof, for such term or terms, under such rents and reservations, and by and with such covenants, provisoes, and agreements, as the said burgesses in common hall assembled, according to the ancient usage of the said borough, should think proper and convenient. And whereas, after the passing of the said last-mentioned act of Parliament, and before the passing of the statute first above mentioned, to wit, on the 1st day of April, in the year of our Lord 1762, the said burgesses of the said borough, being duly in common hall assembled within the said borough, did in their said body corporate *ordain, order, and constitute a certain rule, order, and ordinance*, as follows, that is to say:—"Whereas the burgesses of the said borough have this day taken into consideration the inclosing that part of the open and uninclosed parcel of

Arch. of Pleas,
1839.

HOPKINS
Mayor, &c. of
SWANSEA.

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

land called the Town Hill allotted to them, they are unanimously of opinion that the best and most beneficial method for the corporation of inclosing the same, will be to grant leases of the same for long terms of years, at and under certain yearly rents, to such burgesses as are willing to take the same, and will enter into covenants to inclose such parts as they shall respectively take, within a certain period to be agreed on, on pain of forfeiting such lease or leases; the said burgesses do agree and order, that no lease or grant be made to one and the same burgess, in one and the same lease or grant, of more than fifty acres, nor less than five acres; and it being their desire and opinion that every burgess residing within the borough should receive a benefit from the said inclosure, it is agreed and ordered, that 24*l.* a year of the rents arising from the said inclosure, be paid and distributed yearly by *the common attorneys of the borough for the time being*, on every 2nd day of November yearly, to wit, 8*l.* a year to two of the senior aldermen residing within the said borough, in equal proportions, and 16*l.* a year to eight of the senior burgesses, not being aldermen, and that shall be residing within the said borough; and that such aldermen and burgesses shall personally attend the common attorneys to receive the same; and it is further agreed and ordered, that no alderman or burgess whatsoever, who shall have or take any lease or assignment of a lease of any part or proportion of the said hill, shall have or be paid, or be entitled to have or receive, any part of the said money or distribution under any pretence whatever; and it is further agreed and ordered, that no person or persons whatsoever taking a lease as aforesaid shall assign his term or interest therein, unless to a burgess, on pain of forfeiture, without the license and consent of the corporation under their common seal first had and obtained." [The declaration then stated the granting of the leases on the above terms, and the entry of the lessees, and proceeded:] And

whereas also afterwards, and before the passing of the statute first above mentioned, to wit, on the 21st day of September, in the year of our Lord 1821, the said burgesses of the said borough, being duly in common hall assembled within the said borough, did in their said body corporate duly ordain, order, and constitute a certain other rule, order, and ordinance as follows, that is to say:—
 “The two senior aldermen having relinquished their right to 4*l.* per annum each, payable to them under a former order, ordered, that the number of senior burgesses be increased from eight to twelve, and that they be paid the annual sum of 2*l.* each out of the money heretofore payable to the senior aldermen.” And whereas also afterwards, and before the passing of the statute first above mentioned, to wit, on the 3rd day of October, in the year of our Lord 1825, the burgesses of the said borough being duly in common hall assembled within the said borough, did in their body corporate duly ordain, order, and constitute a certain other rule, order and ordinance, as follows, that is to say:—“That the annuities ordered to be paid to the senior burgesses, by the said order made at the said hall held on the 1st day of April, 1762, should be increased from 2*l.* to 10*l.* each per annum.” And the plaintiff further says, that from the time of the making of the said several rules, orders and ordinances, the said annual payments therein prescribed and mentioned, have been and were duly paid to the said aldermen and burgesses respectively, in pursuance thereof respectively, as the same respectively grew due, up to and until the time of the passing of the said statute first abovementioned; and that before and at the time of the passing of the said statute first abovementioned, the plaintiff had been and was, and from thence hitherto has continued to be, one of the burgesses of the said borough, residing within the said borough, and was not then nor ever has been an alderman thereof, nor has he ever had or taken any lease or assignment of lease of

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

Exch. of Pleas,
1839.

HOPKINS

^{v.}
Mayor, &c. of
SWANSEA.

any part or proportion of the said lands so allotted by the said act of Parliament as aforesaid, and mentioned in the first mentioned rule, order, and ordinance as aforesaid; and that the plaintiff, after the making of the said several rules, orders, and ordinances, the same remaining in full force, and after the passing of the statute first abovementioned, to wit, on the 2nd day of November, in the year of our Lord 1836, was, and for the full period of one year before and up to that day had been, one of the twelve senior burgesses of the said borough, and had for that period resided and was then residing within the said borough, and that the defendants had then received sufficient rents from the said lands so allotted under the said act of Parliament as aforesaid, under and by virtue of leases of the same made pursuant to the said act, and the said first mentioned rule, order, and ordinance, to satisfy the said yearly sums so ordered to be paid by the said several rules, orders, and ordinances aforesaid, and which said yearly sums became due to the said twelve senior burgesses as aforesaid, on the said 2nd day of November, in the year of our Lord 1836; whereby and by reason of the premises, and according to the form and enactments of the said statute first abovementioned, the defendants ought, to wit, on the day and year last aforesaid, to have paid to the plaintiff the said yearly sum of 10*l*. And the plaintiff further saith, that before and at the day and year last aforesaid, the office of common attorney of the said borough had been and was abolished and ceased to exist, and has never since existed, by reason of the passing of the statute first abovementioned, and of the enactments thereof. The declaration then stated a demand of payment, and refusal by the defendants.

Third plea, that before the commencement of this suit, to wit, on the said second day of November, 1836, they the defendants *necessarily, and as they were legally required and bound to do*, paid, distributed, and applied all

the said rents by them received from the said lands as aforesaid, together with and among other rents and sums of money, to wit, the sum of 2,000*l.*, towards and in payment and satisfaction of certain lawful debts then due and owing and payable to divers persons from and by the defendants in their corporate capacity, out of the property of the said borough, and amounting to a large sum of money, to wit, the sum of 2,000*l.*, and by law then payable *in priority and preference* to the payment of the said twelve senior burgesses, or any of them, of the said yearly sums above mentioned to have become due to them on the 2nd day of November, 1836, or any part thereof. Verification.

Exch. of Pleas,
1839.

HOPKINS

^{v.}
Mayor, &c. of
SWANSEA.

Replication, that before the commencement of this suit, to wit, on the 2nd day of November, 1836, a surplus annual income, from the said rents and from other property of the said borough, belonging to the defendants in their corporate capacity, did remain to the defendants, wherewith to pay the annual sums before mentioned, after payment of *the interest of* all lawful debts *chargeable on the lands so allotted as aforesaid*, together with the salaries of municipal officers, and all other lawful expenses which, on the 5th day of June, 1835, were defrayed out of or chargeable on the same. Verification.

Special demurrer and joinder. The several grounds of demurrer are so fully set forth in the argument, that it seems unnecessary to state them here.

J. Henderson, in support of the demurrer.—The replication is bad in point of form: first, as being a departure from the declaration. The declaration states, that the defendants had received sufficient rents from the lands allotted under the act of parliament, to satisfy the yearly sums ordered to be paid by the several ordinances set forth in the declaration, whereby and by reason whereof they ought to have paid the plaintiff the said yearly sum of 10*l.*:

Exch. of Pleas,
1839.

HOPKINS

v.
Mayor, &c. of
SWANSEA.

whereas the replication alleges, that, on the 2nd November, 1836, a *surplus* annual income from the rents and from other property of the borough, remained to the defendants wherewith to pay the annual sums before mentioned, *after payment of the interest of all lawful debts* chargeable on the lands so allotted, together with the salaries of municipal officers, and all other lawful expenses chargeable on them. The declaration, therefore, alleges the obligation to pay to arise out of the mere receipt of the rents of the lands allotted; whereas the replication prays in aid the general surplus arising from the corporation property, after payment of all charges on the lands. In the next place, the replication does not shew that this alleged surplus existed at the time of the passing of the commencement of the suit: it is consistent with all that is stated, that all the rents received in the meantime, since the 2nd of November, 1836, have been applied to the payment of the interest of debts chargeable on the lands.

But the declaration is also bad on several grounds.

I. The first question arising upon it is that which depends upon the construction of the 2nd section of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76. That section enacts, "that every person who now is, or hereafter may be, an inhabitant of any borough, and also every person who has been admitted, or who might hereafter have been admitted, a freeman or burgess of any borough, if this act had not been made, &c., &c., shall have and enjoy, and be entitled to acquire and enjoy, the same share and benefit of the lands, tenements, and hereditaments, and of the rents and profits thereof, and of the common lands and public stock of any borough or body corporate, &c., &c., as fully and effectually, and for such time and in such manner, as he or she by any statute, charter, by law or custom in force at the time of passing this act might or could have had, acquired, or enjoyed, in case this act had not been passed:

Provided always, that the total amount to be divided amongst the persons whose rights are herein reserved in this behalf, shall not exceed the surplus which shall remain after payment of the interest of all lawful debts chargeable upon the real or personal estate out of which the sums so to be divided have arisen, together with the salaries of municipal officers, and all other lawful expenses which, on the 5th day of June [1835], were defrayed out of or chargeable upon the same." And a subsequent proviso enacts, "that nothing in this act contained shall be construed to strengthen, confirm, or affect any claim, right or title of any burgesses or freemen of any borough or body corporate, or of any person, to the benefit of any such rights as are hereinbefore reserved, but the same in every case may be brought in question, impeached, and set aside, in like manner as if this act had not been passed." It is clear from all the terms of this clause, that it does not create any new right whatever, but only preserves pre-existing legal rights. This is confirmed by reference to other sections, especially sections 68 and 92, the latter of which would exclude the legal rights of the freemen altogether, and cast their property into the public fund of the borough, but for the second section, which *protects* them from the operation of section 92. Then the next question is, whether this right had any existence before the act, either at common law, or by virtue of a bye-law of the borough.

II. Now it is clear no such right could exist at common law, independently of any bye-law. And the "rule, order, or ordinance," stated in the declaration, was not a legal bye-law. In Bac. Abr., By-law, a bye-law is defined to be "a private law made by those who are duly authorized thereunto by charter, prescription, or custom, for the conservation of order and good government within some particular place or jurisdiction." This ordinance does not purport to control, moderate, or direct the state or pro-

Exch. of Pleas,
1839.

HOPKINS

^{v.}
Mayor, &c. of
SWANSEA.

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

ceedings of the corporation, or any member of it—it is no more than a declaration of the opinion or intention of the then members, as owners of a proprietary right, that certain funds shall thereafter be applied in a particular way for the exclusive benefit of certain individuals. It is just the same as the declaration by the head of a family, of his intention to apply particular funds within his control to the use of an individual. In *Dunston v. Imperial Gas Light and Coke Company* (a), where it appeared that the company, being incorporated by act of parliament, and empowered to make bye-laws, under seal, for its government, and for regulating the proceedings of the directors, &c., had passed a resolution, not under seal, that a remuneration of a guinea for each time should be allowed to each director for his attendance on courts, committees, &c., it was held that this was neither a bye-law within the statute, nor a contract with the directors, and therefore that they could not maintain an action of debt for payments according to such resolution. [*Alderson*, B.—But why may not this be a bye-law within the meaning of the Municipal Corporation Act? The second section implies that a pecuniary benefit in the corporation funds may have been given by a *bye-law*. You say this is no bye-law according to the strict legal definition:—that only shews that the word is used in the act in a larger sense than that which is assigned to it in Bacon's Abridgment. Lord *Abinger*, C. B.—Any rule or ordinance which the corporation were empowered at common law to make, is a bye-law.]

III. Then, in the next place, assuming that this was a bye-law which the corporation were authorized to make, no action is maintainable upon it. No case can be adduced, in which an action has been held maintainable against a corporation on its own bye-law. Such an action could be

(a) 3 B. & Adol. 125.

founded only on the ground that it creates a *contract*. Now it may perhaps, as between one corporator and another, who are parties to it, raise a presumption of a contract; but as to strangers, the alleged contract must be subject to all the incidents of an ordinary contract. How, then, can it be said that there is any contract with this plaintiff, or with any person whom he represents? The "twelve senior burgesses for the time being" can have no succession within the corporation—they are not an "imperium in imperio." None but the twelve senior burgesses at the time when the ordinance was made, could allege that there was a contract with them. But further, there is no consideration for such supposed contract. The right of pasturage was vested in the corporation itself, not in individual corporators, as between them and the corporation; they had no personal interest whatever in it: the corporation were the unrestricted lords of the soil—how then could there be any consideration for a grant by them of a personal benefit in it, to individual corporators? [Lord Abinger, C. B.—It is a fallacy to consider it as a *contract*—it is no contract.] Then, what breach of *duty* is there, which gives a right of action against the corporation? The ordinance directs that the yearly sums shall be paid by the common attorneys of the borough for the time being: no duty is shewn of payment by the corporation; the resolution imported no more than a duty in a particular individual to pay: and the abolition of his office cannot of itself transfer that duty to the corporation. Supposing any right of action to exist, when did it accrue?—not when the corporation received the rents, for they received them for their own use; or if partly for the purposes of this trust, it is not a trust which this Court is capable of enforcing. The plaintiff's remedy, if he has any, is in equity; he has no legal right recognizable in a court of law. His right could not attach until the accounts were taken, and it were ascertained that sufficient funds re-

Exch. of Pleas,
1839.

HOPKINS

Mayor, &c. of
SWANSEA.

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

mained after payment of the interest of debts, &c. It cannot be contended that the ordinance imports the grant of an annuity; if not, the corporation receive for their own use in law, as much as they would independently of it. They hold the funds in a fiduciary character only, and they can be administered only in a court of equity, where the accounts can be fully taken. It is not like the case where a trustee has admitted a balance in his hands to the use of the cestui que trust, in which case he is liable at law; *Roper v. Holland* (a).

Lastly, the plea is good. It is clear that all the funds of the corporation are applicable in the first instance to the payment of their debts. [*Parke, B.*—It is quite consistent with the plea that the corporation have a large fund of personal property, or rents, with which they might have paid the debts, leaving the rents of this land free.] It is averred that the defendants “*necessarily*, and as they were legally required and bound to do,” paid all the rents received by them from the lands in question, together with and among other monies, to the payment of lawful debts. That implies that they could not satisfy the debts without the application of these rents. It is sufficient if the plea be good on *general* demurrer, the plaintiff having pleaded over: and to a common intent it sufficiently avers, as a mixed proposition of law and fact, that it was necessary to apply these rents to another purpose.

E. V. Williams, contra.—First, the plaintiff may take the benefit of the 2nd section of the 5 & 6 Will. 4, c. 76, and enforce his right to this payment by an action of debt; the declaration therefore shews a *prima facie* case. And secondly, if that be so, the plea shews no answer to it.

I. The declaration discloses the fact, that the then governing body of the corporation, in whom the title to the

(a) 3 Ad. & Ell. 99; 4 Nev. & M. 668.

lands was vested, with power to make leases of them with such covenants and agreements as they should think proper, duly made and ordained the "rule, order, and ordinance" in question, whereby, after reciting that they were of opinion that the most beneficial mode of inclosing the open lands would be to grant leases of them to the burgesses, with covenants to inclose them within a certain period, they order that certain annual sums of the rents arising from such inclosure shall be paid yearly, by the common attorneys of the borough for the time being, to each of the senior burgesses residing within the borough; no burgess who shall take a lease being entitled to receive any part of the money so distributed. This is objected to as not being properly a *bye-law*. Now, there is no precedent of any bye-law which is pleaded in words as a bye-law; that is not a term known in pleading, but is only a more convenient designation adopted for the sake of brevity; in all the precedents, it is pleaded in the language here adopted, as a "rule, order, and ordinance." By this bye-law, then, the right was conferred, and continued to exist until the passing of the 5 & 6 Will. 4, c. 76. And by the second section of that act, it is continued in parties in the situation of the present plaintiff. If the act had not been passed, the plaintiff might and would have enjoyed under the bye-law the sum he now seeks to recover: then the act declares expressly that every inhabitant or burgess "shall have and enjoy the same share and benefit of the lands, &c., and of the rents and profits thereof, and of the common lands and public stock of any borough or body corporate, as fully and effectually as he by any statute, charter, *bye-law*, or custom in force *at the time of passing this act*, might or could have had or enjoyed in case this act had not been passed." It is said that even if the right exists, it is not enforceable by an action of debt. But the rule of law is, that wherever a pecuniary benefit is given by statute to an individual, he may sue for it in debt:

East. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

Com. Dig. Debt, (A) 9. In an anonymous case, 6 Mod. 27, *Holt*, C. J., says—"If money be devised out of land, sure the devisee may have debt against the owner of the land for the money, upon the statute of 32 Hen. 8, c. 1, of wills; for wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him, contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy except in equity." It is unnecessary, therefore, to argue whether the plaintiff could have sued before the statute. [*Parke*, B.—Mr. *Henderson's* argument is, that the statute gives no new right, but only continues the old. If so, and if the bye-law gave no right of action at law, the plaintiff has none now; if he had before the act only a remedy in equity, he has only that still.] The statute imposes a duty on the corporation to depart from their former mode of payment through a proxy whose office is abolished, and themselves to pay, except in certain events. It is the statutory duty of the corporation to comply with the act in that respect; and as the performance of that duty would lead to the benefit of the plaintiff, and the non-performance of it to his injury, the law will compel them to perform it by means of an action of debt. It clearly was the intention of the legislature that the parties should continue to receive these bounties. That appears not only from the 2nd section, but also from the saving in s. 92, of "all rights, interests, claims, and demands of all persons in and upon the real or personal estate of any body corporate, by virtue of any proceedings either at law or in equity &c., or by virtue of any mortgage or otherwise"—words fully large enough to include this case. [*Alderson*, B.—You may say that if there was a precedent right only in equity, the statute preserves that only; but if there was no right, but only an enjoyment as against the old corporation,

under a bye-law made for their own regulation, the statute, providing that the money shall still be paid, gives impliedly an action at law to recover it.] It is submitted that such was the meaning of the legislature. It is clear, on the whole of the 2nd section, that the statute recognizes the existence of a right to receive a portion of the public stock of a borough by force of a bye-law; and the proviso at the end, which has been relied on, means only this—that if on investigation it should turn out that the bye-law was not properly made by the governing body, it may be impeached as before. But here there is no doubt that this bye-law, which is averred to have been duly made by the governing body, is one of the very bye-laws contemplated by the act, and that before the act it gave the corporation a clear power to dispose of their revenues in such manner as to the governing body should seem meet. It is a mistake to suppose that the plaintiff is in no better condition than before the statute; his right is modified by the statute, and a new duty created in respect of it, which may be enforced in an action of debt.

But it is not conceded that debt would not have been maintainable, at common law, by a corporator against the corporation upon the bye-law. It is *lex loci*;—it was the duty, therefore, of the corporation to comply with it; if they did not, they were suable in debt. But, at all events, the plaintiff has now a legal right, compounded of his previous rights, and of the modifications of them introduced by the statute; on that statute, therefore, which gives him this personal benefit, he may maintain an action of debt.

Secondly, the plea is bad in substance.—It attempts, in effect, to bring the case within the proviso in the second section, which limits the fund for payment of these sums to the surplus after payment of the *interest of debts &c.*: but all that it alleges is, that the defendants, on the 2nd of November, 1836, necessarily &c. paid and applied

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

Act. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

all the rents by them received from the said lands, together with other monies, "towards the payment and satisfaction of *certain lawful debts* then due from the defendants in their corporate capacity out of the property of the borough, and by law then payable in priority and preference to the payment of the yearly sums to the twelve senior burgesses." The defendants were not bound by the act first to make such payments. [*Parke, B.*—Are not the corporation bound to pay the debts of their creditors, before making these voluntary payments? The second section applies only to the payment of interest of debts charged on the land:—what are they to do if they have large debts secured by bond? The section would apply to a corporation not in debt at the passing of the act; but if it were in debt, would not the creditors retain all their legal remedies?] The effect of section 2 is, that the payments are to continue to be made, unless in the event of there being no surplus after the payment of the interest of debts charged on the particular land. It is quite consistent with this plea that all the debts referred to have been incurred since the passing of the act, and that none of them are charges on this land. The allegation as to their being payable "in priority and preference," means no more than *duly* payable;—that is an inference of law. [*Parke, B.*—The question is, whether you ought not to have demurred specially to the plea: it alleges that there were debts which the defendants were *legally bound* to pay, and which were payable in priority and preference to the payments to the burgesses—which could not be, unless they were incurred before the passing of the act. You say the plea does not shew how they were so payable; is not that ground of special demurrer?] Where nothing is stated but what is a mere inference of law, which carries the defect no further than if it were not stated at all, that is a substantial defect, and may be objected to on general demurrer. The allegation referred to is a mere expression of

that which would have been implied, and could not have been traversed. The intention of the second section of the act was to put corporations on the same footing as the nation—viz., to enable them to make payments of this kind after payment of *the interest* of existing debts, and the salaries of officers. If so, the plea is clearly bad.—And the replication is then good; because it raises the precise issue which properly arises on the terms of the statute.

Err. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

Henderson, in reply.—The proposition, that the statute confers the right now claimed, might lead to monstrous consequences; one of them is, that a creditor whose debt was not charged on the particular land, would be postponed to parties who are the mere objects of the bounty of the corporation, and the payment of his principal probably deferred for ever. The words of the act plainly shew that it intended merely to preserve existing rights and remedies. The real question is, whether the corporation are not first bound to pay all their revenues in discharge of all their debts. Then, is there any right under the bye-law to claim payment in priority to creditors? On the contrary, it would be bad if it gave such a power; either the creditor would be deprived of his right to sue, which is monstrous, or the corporation would still remain liable to these claims, after payment of their funds in discharge of their debts. The claims, therefore, must be founded upon a surplus, which the plea shews does not exist. And the plea is good, at least on general demurrer: it states a mixed proposition of law and fact, like the plea of plene administravit by an executor: it states as a fact, that the rents were applied in payment of debts, and avers that they were so paid necessarily, and under a legal obligation, and in priority. The plea could be proved only by proof of payments in respect of debts chargeable on these lands, and existing at the passing of the act. The effect is to aver both the fact and the lega-

Exch. of Pleas,
1839.

{ *HOPKINS*
v.
Mayor, &c. of
SWANSEA.

lity of the payments. The replication is bad as involving a departure; for it is consistent with it, that although there was a surplus from the whole produce of the lands on which the debts were charged, there was none from the produce of these particular lands, after payment of the interest.

LORD ABINGER, C. B.—I am of opinion that the judgment ought to be for the plaintiff. The first question is, whether the declaration be good. Now this declaration states this fact, that certain portions of land, which were known by the description of the Town Hill and Borroughs, were, in the second year of the reign of George the Third, by an act of parliament, inclosed; then it states the substance of that act of parliament, which is sufficient for the purpose of the declaration. The act of parliament recites the fact, that the fee simple of the land belonged to the Duke of Beaufort, and that the mayor and burgesses of Swansea had the right of pasturage or herbage: it does not state precisely how the right was exercised, whether by the corporation turning beasts upon it in their corporate capacity, or whether by the individual members of the corporation turning their beasts upon the common: but the act of parliament proceeds to direct, that the lands shall be divided in certain portions; 150 acres are appropriated to the Duke of Beaufort in one part, and the other part, called the Borroughs, is appropriated to the corporation; and the same act of parliament goes on to enact, that “the corporation shall, in their common hall assembled, appoint such leases to be granted as they shall think fit and expedient, with such covenants, provisoes, and agreements as to the corporation then assembled shall be thought reasonable.” It further appears by the declaration, that in the April following, viz., in 1762, which is more than sixty years ago, the corporation assembled in their common hall, in obe-

dience to the directions of the Act of Parliament, and at that common hall they agreed to a certain ordinance—which in fact is a bye-law—prescribing that leases should be granted of this land in certain proportions, in no case less than five acres, and in no case more than fifty; and that bye-law recites, that it was the intention and object of the corporation that each burgess should receive some benefit from it, (and it is highly probable that each burgess would receive some benefit from the right of common before—it is known to be the case in many corporations:)—then they say that none but burgesses shall be entitled to a lease, and that no lessee shall be entitled to any of the rents, but that certain annual payments shall be made to each of the senior burgesses out of this rent, and the remainder is to enure to the benefit of the corporate body; and further, that the individual burgesses are to appear personally to make the demand before they shall receive their portions of the rent, which are to be paid to them by the *common attorneys* of the borough for the time being—an office which ceased to exist on the passing of the Municipal Corporation Act. There is a further provision, that no burgess who is a lessee shall receive any of these allowances, because he is supposed to have a benefit in his lease. There is also a provision, that no lessee shall assign his lease to any but a burgess, without the consent of the corporation; so that this was to have the effect of keeping the property in the hands of the corporation, for the benefit of certain portions of the members according to their seniority. There is nothing unreasonable in this bye-law; it is in a great measure framed in obedience to the act of Parliament, and the restriction of the benefit seems not unreasonable: we must presume that the individual burgesses who were the objects of it, were making some commutation of certain rights which they had before this fixed rent was reserved. The payments made under this bye-law, with

Reck. of Pleas,
1889.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

East. of Pleas,
1889.

HOPKINS

Mayor, &c. of
SWANSEA.

some variations in amount introduced by subsequent orders, have continued from the month of April, 1762, down to the period when the Municipal Corporation Act was passed; for a period, therefore, of above sixty years. The first effect of that act was to sweep away all rights whatever which had been exercised under any former corporation. As the act passed through the legislature, it was sifted and examined, with a disposition not to injure individual rights, inasmuch as many members of corporations had lawfully enjoyed individual rights and benefits, in their corporate capacities; and to create new corporations, and apply their funds to new purposes, without reserving the rights of such parties, would have been to do an act of great injustice to the individuals; and whether such a benefit was enjoyed in the shape of a right of common existing at the time when the act was passed, or whether it was enjoyed in the commuted shape of rent reserved, was just the same, and depended upon the same principles: and the object of the 2nd section of the act was to preserve those rights.

The first question then to be considered is, whether or not, before this act of Parliament was passed, this bye-law would have enabled the individual burgess to maintain an action. Now it appears to me, (though I own at first, and during a great part of the discussion, I was a good deal induced to doubt upon that point by Mr. *Henderson's* argument)—that he might have maintained the action. The bye-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of Parliament has upon the subjects at large: and the dictum of Lord *Holt* which has been cited, and which seems perfectly reasonable, that it would be absurd to say an act of Parliament should pass to give a man a benefit, and that he should not have an action for it, is equally applicable to the case of a bye-law, confining it to the persons on whom it is intended

to operate. This bye-law, therefore, bound the corporation to appropriate the rents of the town lands in that particular way: and if the corporation choose to intercept the rents and keep them in their own hands, it appears to me that the bye-law gives a just foundation for an action of debt against the corporation. If that be so, there is no occasion to consider whether the statute of 5 & 6 Will. 4, gave any confirmation of that right, because it is sufficient to say that if it did not take it away, it preserved it. But I am far from saying there is nothing in the argument presented by Mr. *Williams* upon this point: particularly when we consider the spirit and object of the statute. Suppose, instead of declaring that the parties should still have and enjoy the same benefit of the lands, &c., of the corporation, it had provided that the corporation "should continue to pay" all such parties—then the corporation would clearly be bound to pay; and in substance that is the same thing as to say the parties are entitled to receive. From whom are they to receive?—from the new corporation: therefore the new corporation are bound to pay. Therefore, without pronouncing a final opinion upon that point, I am far from saying there is nothing in the argument that the new act of Parliament would have given the right of action; because, as it gives the right to receive, it appears to me to impose upon those who are to pay, the obligation of paying. If it is a necessary inference that the new corporation shall continue to pay, that would entitle the plaintiff to bring his action upon the statute.

The declaration, then, being good, the next question is whether the plea is good. Now there is no suggestion upon the record—it is not to be presumed from the declaration, nor is it suggested in the plea—that upon this specific portion of land there existed any previous obligation to any creditor whatsoever. I must take it, therefore, that this land came into the hands of the new corporation, the defendants, without any existing debt upon

Each. of Pleas,
1839.

HOPKINS
Mayor, &c. of
SWANSEA.

Exch. of Pleas,
1889.

HOPKINS
Mayor, &c. of
SWANSEA.

it prior to the claim of the burgesses: if so, these persons would have a right to the rents. The plea seems studiously to avoid meeting that case; because, if there had been any debt upon this land, which the corporation were bound to pay anterior to any rights created under the bye-law, there is no doubt that would have bound the new corporation as well as the old; binding the old corporation, the new could only take it subject to that anterior claim:—but the plea does not state that. What, then, was the intention of the act of 5 and 6 Will. 4, c. 76? There was nothing in the act to alter the rights of creditors, with respect to the antecedent rights of the burgesses, excepting that it made it a qualification preceding the payment to them, that there be a surplus sufficient for that purpose, after payment of the expenses of the corporate officers, and the interest of the debts chargeable on the real and personal estate out of which the sums so payable had arisen. In order to bring the plea within this proviso, it ought to have appeared upon the face of it, that the debts which the corporation were obliged to pay,—or, if interest, the interest which by the statute they were entitled to pay,—was interest arising from some debt chargeable upon that specific land; because otherwise it would not constitute a prior claim to the claim of the burgesses. The mere statement here of the priority of the claim, is an allegation that means nothing; it ought to have appeared distinctly that they were debts existing before the passing of the act. I think there is a great deal too much looseness and vagueness in the mode of alleging this priority, for us to construe it as a sufficient allegation that there was any specific anterior claim upon this land, which could operate to prejudice the claim of the burgesses, and to bring the case within the proviso of the statute. But if we could suppose that the intention of the plea was to allege that there was not enough to pay all the corporation were bound to pay, then we must take

the replication also to deny that; because the replication states that there was a surplus beyond that, and therefore it is in substance a denial. I believe we all thought the plea was bad on special demurrer; and on consideration, I think it is bad on general demurrer, for not alleging that the debts to which the rents were applied were such as to fall within the proviso in the 2nd section, and therefore to have priority over the claims of the burgesses. Upon these grounds, I think the judgment ought to be for the plaintiff.

Esch. of Pleas,
1839.

HOPKINS
Mayor, &c. of
SWANSEA.

PARKE, B.—I am also of opinion that the judgment ought to be for the plaintiff. The first question in this case is, whether the declaration is good. It is framed upon an ordinance of the corporation, which appears to have been made for the proper distribution and protection of the corporate property. I am strongly inclined to think, that independently of the act of 5 & 6 Will 4, an action would lie against the corporation, by a person who is directed by a bye-law of the corporation to take a benefit under it. This bye-law was enacted by the corporation at large in consequence of the inclosure of a piece of land which belonged to the Duke of Beaufort, over which a right of herbage existed in the corporation at large, and which they might allow to be taken by the cattle of the burgesses, or might dispose of it in any other way they thought fit. The declaration does not state that before the bye-law the burgesses were in the habit of depasturing; but after the passing of the Inclosure Act, a portion of the land having been allotted to the corporation, there is a bye-law made by the common consent of all the members of the corporation, or at least by a sufficient number of them to make it a valid bye-law. [His Lordship then read the bye-law.] Now I think the effect of that bye-law, which is a pri-

Exch. of Pleas,
1839.

HOPKINS

^{v.}
**Mayor, &c. of
SWANSEA.**

vate law regulating the corporation property, and binding the corporation as to the individual members of it, is this:—that each burgess named in it acquires a right to receive a certain sum of money, and consequently a duty is imposed upon the persons who are directed by the ordinance to pay it: those persons were the common attorneys of the borough for the time being, and they were bound to pay to each of the twelve senior burgesses the amount of 10*l.* a-year. In the case that has been referred to, it is laid down by Lord *Holt*, that where a statute gives a benefit to a party, he has a right of action at law; and I am strongly inclined to think that upon this bye-law also he would have such right of action, because the effect of the bye-law is to make it a duty imperative upon the common attorney to pay the money; until the act of Will. 4 interposes, and the common attorney is taken away altogether; so that that intermediate step is now removed, and the corporation, having received the money, must apply it as it was before applied through the intervention of the officer who no longer exists: by the effect of the statute, the duty is cast upon the body politic at large to pay these sums to the individual members. It seems to me, therefore, that at common law the plaintiff would have had a right to recover. Now, the effect of the statute is to continue to all the persons who, before the passing of the act, were enjoying corporate benefits, whether by virtue of any usage, custom, bye-law or otherwise, the enjoyment of them; and to make it obligatory on the corporation to continue to pay to such individuals the benefits which they enjoyed before; subject, indeed, to any thing which before would have defeated the bye-law or custom under which they were enjoyed, if the bye-law or custom itself were bad. Therefore I think, though it might by possibility have been only a benefit which these parties enjoyed under the bye-law before, and not a right enforce-

able by action, it is now, under the statute, converted into a right; and that being so, by virtue of the common law and the statute taken together, the declaration is good, and the plaintiff has a *prima facie* right to recover the rents receivable from these lands; because we cannot presume the corporation to have any object to which they had a right to apply the rents received from the lands—we cannot presume they were in debt, or had any other expenses which would prevent their complying with the bye-law; and therefore any defence which may arise upon that ground must come from the defendants. The declaration then being good, next comes the question whether the plea is good. It is framed upon the supposition, that by the true construction of the act of Parliament, the corporation have a right to apply all the revenues and all the property of the corporate body, in discharge of the debts contracted by them antecedently to the passing of the municipal corporation act: that as this act of Parliament could not have been intended to give a benefit to the individual corporators at the expense of the creditors of the corporation, it therefore preserves to the corporation the right of applying those revenues to the payment of their existing debts. Now supposing that to be the true construction, there would be a question whether this plea is not bad upon general demurrer, because it does not state in express terms that these payments were made for antecedent debts; it only states that the defendants “necessarily, and as they were legally required and bound to do, paid, distributed and applied all the said rents by them received from the said lands towards and in payment and satisfaction of certain lawful debts then due and owing and payable to divers persons” by the corporation. Does that mean debts due at the time that the payments were made, or does it mean debts due at the time of the passing of the act of Parliament? That is left obscure upon these words of the plea—but it

Book of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

Exch. of Pleas,
1839.

HOPKINS

Mayor, &c. of
SWANSEA.

is said that this obscurity is removed by the averment that they were debts payable "in priority and preference to" the sums payable to the twelve senior burgesses. That possibly may be so, although I have some doubt whether it is; but it ought at least to have been averred that the corporation were bound to apply the revenues of this particular estate in payment of such debts; because if they have abundant funds elsewhere, they ought not to deprive the corporators of the rents arising from the occupation of this particular estate; and the plea does not, as it appears to me, exclude the possibility that the corporation have ample revenues elsewhere, out of which they might have paid those debts without injury to the corporators entitled under the bye-law. It is said, that difficulty is avoided by the word "necessarily;" but that does not appear to me to be so clear as to preclude the possible existence of a state of facts which would prevent the corporation having the right to pay the debts out of the rents of this estate. It seems to me, however, that quite independently of any formal construction, the plea is bad in substance; and that the true construction of the act of Parliament is, that the body corporate have not the power to defeat the right of the corporators or freemen, by any *voluntary* act of theirs in favour of other creditors; for, upon consideration, I think we must adopt the arguments which have been so ably urged by Mr. *Williams*, that the effect of the Municipal Corporation Act is to oblige the body corporate to apply the surplus of the revenues, after the payment of the *interest* of the debts charged upon the lands, and after payment of all other lawful expenses, to the payment of the sums in question; that is, to oblige them to appropriate *all* the surplus rents to that purpose; not exceeding the surplus, because they are expressly prohibited from doing so; but to the extent of it, they are to apply those rents accordingly, and are not to be empowered to defeat the

rights of these persons by applying them voluntarily to the payment of debts. That is no injury to the creditor, because his rights against the corporation are preserved entire, and he may sue the corporation at any time for his debt, and any arrangement they may make is not to stand in the way of the creditor in suing the corporation; and he may take out execution against the corporation, and seize and satisfy himself out of any part of the corporate property; and if the creditor actually do so, there is an end of the rights of the freemen altogether, so far as relates to the property so seized. Therefore it seems to me, that consistently with the rights of the corporators, we may put such a construction upon the act of Parliament, as to leave the rights of the creditors unimpaired. In that view of the case, it becomes unnecessary to consider whether the plea is good in form, although I am inclined to think, for the reasons before stated, that it is not.

With respect to the replication, it appears to me that that is bad also, but it is unnecessary to decide that, because I think the plea is bad, and the declaration is good; therefore the plaintiff is entitled to judgment.

ALDERSON, B.—I am of the same opinion. It appears to me that the bye-law in question was one which the corporation then existing had authority to make, for the purpose of distributing the funds in the way in which this bye-law distributes them. If that be so, then I concur with the rest of the Court in thinking that there is a right of action upon it, on the principle laid down by Lord *Holt*; that there is an action of debt, arising out of the duty imposed upon the officer by whom the money was to be paid, in respect of that money, for the persons who were to receive it from him. Under the Municipal Corporation Act, that office is abolished, and the corporation themselves become pos-

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

Exch. of Pleas,
1839.

HOPKINS
v.
Mayor, &c. of
SWANSEA.

sessors of the property, in the same manner, and subject to the same rights, as were before possessed by the corporators under the attorney. Therefore I think that under the Municipal Corporation Act, coupled with the other circumstances of the case, an action of debt arises, by reason of the obligation of the officer who was to pay the money, and against whom an action of debt would have lain before the statute.

With respect to the plea, it appears to me that my Brother *Parke* has put the true construction upon the act of Parliament; that is to say, that the corporation have no right, in priority to the claims of the corporators, to pay any thing more than the interest of the debts; but if the creditors, in the execution of their rights, were to take away the lands in question, that would be a complete answer, because then the corporation would not have the land, and in that case the right of the freemen would be set aside altogether, by reason [of the subject matter being taken away out of which their right originated.

It is not necessary to give any opinion upon the replication, but it appears to me that it is bad also.

I confess I should also have thought the plea bad upon the other ground taken by Mr. *Williams*; for the words "payable in priority and preference" amount to very little more than a statement that the defendants lawfully had a right to pay the debts, because they chose so to consider them payable.

Judgment for the plaintiff.

Exch. of Pleas,
1839.

STUART v. ROGERS and TAYLOR.

ASSUMPSIT on a promissory note. The defendant Taylor suffered judgment by default for want of a plea; and on behalf of the other defendant, who proceeded with the action by a different attorney,

Where, in an action of assumpsit, one of two defendants suffers judgment by default, the other defendant is still entitled to judgment as in case of a nonsuit, for not proceeding to trial.

Keating moved for judgment as in case of a nonsuit, for not proceeding to trial.—If the plaintiff had gone to trial against the remaining defendant, he might have been nonsuited. In *Murphy v. Donlan* (a), it was held that after judgment by default against two defendants, the plaintiff might, on the trial of an issue joined by the remaining defendant, elect to be nonsuited. The defendant is therefore entitled to move for judgment as in case of nonsuit. *Jones v. Gibson* (b) is an express authority in favour of this application.

Palmer, contra.—The case of *Jones v. Gibson* was determined without reference to *Harris v. Butterley* (c), where it was held, in trespass against several defendants, that if any suffer judgment by default, the plaintiff need only give evidence to affect the rest, and that the plaintiff could not be nonsuited; or to *Hannay v. Smith* (d), where it was held that if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited, but such defendant must have a verdict if the plaintiff fail as to him.

PARKE, B.—The case of *Murphy v. Donlan* decides this question. As to the action of trespass, there may be a distinction: in trespass, the jury would have, at all events to assess the damages against the defendant who has suffered judgment by default; but

(a) 5 B. & C. 178.

(c) Cowper, 483.

(b) Id. 768.

(d) 3 T. R. 662.

Exch. of Pleas,
1839.

STUART
v.
ROGERS.

in assumpsit, a nonsuit or verdict against the plaintiff puts an end to the whole case. The motion may therefore be sustained.

A stet processus was afterwards recommended and accepted.

OLIVER v. WOODROFFE.

A cognovit was given by a minor, authorizing an attorney to appear for him and confess an action brought against him for a precise sum for necessities provided for him by the plaintiff, with an undertaking "not to bring any writ of error, nor do any act to prevent the plaintiff from entering up judgment or suing out execution:"—*Held* bad on three grounds; 1st, that an infant cannot appoint nor appear by attorney, but only by guardian; 2ndly, that he cannot state an account; 3rdly, that he cannot deprive himself of his right to bring a writ of error, or any other right to which he was entitled.

WORDSWORTH had obtained a rule calling on the plaintiff to shew cause why a cognovit executed by the defendant should not be taken off the file and cancelled, and why the appearance entered for the defendant by one H., the plaintiff's attorney, together with all subsequent proceedings, should not be set aside, and the defendant discharged out of custody. The following facts appeared upon the affidavits:—

The defendant, who is an infant, on being served with a writ at the suit of the plaintiff, went to the office of the plaintiff's attorney, who asked him if he would sign a cognovit, which he consented to do. Mr. H. then informed him that since the stat. 1 & 2 Vict. c. 110, s. 9, the cognovit must be attested by an attorney on his behalf; the defendant said that he did not like to ask any one he knew, and Mr. H. replied that "he would get a friend of his whom he mentioned, and who lived in the next street, to attend on his behalf," and made an appointment to meet that person at a certain hour. The defendant went at the

To constitute an express naming of an attorney, within the stat. 1 & 2 Vict. c. 110, s. 9, it is sufficient if the attorney be named by another party, and adopted by the defendant, who calls upon him to request him to attest the execution of the cognovit; and it is not necessary that he should be in the first instance named by the defendant.

The attestation need not state that the attorney was *named by* the defendant; it is sufficient if he therein declares himself to be attorney for the defendant, and states that he subscribes as such.

The cognovit need not be *read over to* the defendant before execution, if he be informed of its nature and effect.

hour appointed, by the direction of Mr. H., to the office of the person named, Mr. P., and announced himself as having come there from Mr. H. Mr. P. intimated that he knew his name and purpose, and went with him to Mr. H.'s office, where the cognovit was executed. In the attestation, Mr. H. described himself as "the attorney expressly named *for* W. Woodroffe, and attending at his request," &c. The cognovit contained the usual clause, "undertaking not to bring any writ of error, nor do any act or thing to prevent the plaintiff from entering up judgment or suing out execution." The appearance was in the following form:—"A. H., attorney for the plaintiff, appears for the defendant on cognovit."

Exch. of Pleas,
1839.

OLIVER
v.
WOODROFFE.

The rule was applied for on the following grounds:—First, that it was consistent with the terms of the attestation, that the attorney was not named by the defendant. [*Parke, B.*—All that the statute requires is, that he shall, in the attestation, declare himself to be the attorney for the defendant, and state that he subscribes as such. He must be named by the party himself, but he need not state that in the attestation.] Secondly, that the cognovit was not read over to the defendant before execution. [*Parke, B.*—The statute only requires that he shall be informed of its nature and effect.] Thirdly, that the attorney was not in fact named by the defendant, but by the plaintiff's attorney; and lastly, that the defendant being an infant, the cognovit was invalid.—On the two last grounds a rule was granted; against which

Humfrey shewed cause.—There is no reason why an infant may not give a cognovit, though his warrant of attorney might be objectionable. An action may be brought against an infant for necessaries, and why should he not confess it, in order to save further expense? Here the articles for the supply of which the action was brought were clearly necessaries. [*Parke, B.*—An infant cannot

Exch. of Pleas,
1839.

OLIVER
v.
WOODROFFE.

state an account.] As to the other point, the words of the 1 & 2 Vict. c. 110, s. 9, are the same as those which related to cognovits given by persons in custody in final process; and under the old law, it was sufficient that the attorney employed should be adopted by the party, though his name might have been originally suggested by some one else. *Fisher v. Papanicholas* (a) is very distinguishable in its circumstances from the present case; there the attorney attended at the request of the opposite party. *Bligh v. Brewer* (b) is much more like the present case, and is expressly in point for the defendant.

Wordsworth, contra.—As to the first point, it is admitted that in the case of a warrant of attorney, it would have been invalid if given by an infant; then why, under the same circumstances, can it be said that he can execute a cognovit? He cannot appoint an attorney, because he cannot appear in Court by attorney. Here the cognovit empowers Mr. H. to enter an appearance for him, and the appearance is so entered. In *Weaver v. Stokes* (c), it was taken for granted that a warrant of attorney given by an infant would be void. As to the other point, it is submitted, that in order to further the object of the new statute, the provisions of sect. 9 must be strictly complied with, The object of the statute was, as much as possible, to limit the power of arrest, and a cognovit, which may be used as a means of arrest, must be executed in strict compliance with the statute.

Lord ABINGER, C. B.—On the first point we wish to take time to consider, but on the other point there can be no doubt. The naming an attorney means the employing one at the party's own will and pleasure. Here the attor-

(a) 2 C. & M. 215.

(b) 1 C. M. & R. 651.

(c) 1 M. & W. 203.

rey was in the first instance named by another, but the defendant afterwards assented to the appointment, and accepted him as his attorney for the particular purpose. The other point is worthy of consideration.

Exch. of Pleas,
1839.

OLIVER
v.
WOODROFFE.

PARKE, B.—This case, with respect to the second question, is on all fours with that of *Bligh v. Brewer. Weaver v. Stokes* was the case of a warrant of attorney, and is not applicable to the present case. As to the validity of the cognovit, it depends on rather a nice question. Giving a cognovit is in fact one mode of appointing an attorney. Then on what grounds is it that an infant cannot appoint an attorney? Is it that he cannot bind himself by deed, or that he is not to be bound by the act of another? To make such a cognovit good, should it not expressly state that it is an authority to appear by guardian only?

Cur. adv. vult.

On the following day the judgment of the Court was delivered by

LORD ABINGER, C. B.—We think that the question reserved by us for consideration must be decided in favour of the defendant. We come to this conclusion on three grounds, each of which is fatal to the validity of the cognovit. First, it is bad because it falls within the principle which prevents an infant from appointing and appearing in Court by attorney; he can appear by guardian only. Secondly, by this means the minor is made to state an account, which the law will not allow him to do so as to bind himself; if an action be brought against him, the jury are to determine the reasonableness of the demand made. Thirdly, the general principle of law is, that a minor is not to be allowed to do anything to prejudice himself or his rights, which he here does by under-

Exch. of Pleas,
1839.

OLIVER
v.
WOODROFFE.

taking not to bring a writ of error. If there had been no stipulation in this cognovit to deprive him of the benefit of a writ of error, he might afterwards defeat these proceedings by alleging his minority as error in fact. For these three reasons, therefore,—that an infant cannot appoint an attorney, that he cannot state an account so as to bind himself, and generally that he cannot do any act to prejudice his rights, we think this cognovit cannot be supported.

Rule absolute.

LEWIS v. JAMES WILLIAM DAVISON.

Declaration in assumpsit stated that J. D. was indebted to the plaintiff in 280*l.*, and the plaintiff had commenced an action against him to recover it, which was pending; and that, in consideration that the plaintiff would accept and receive from J. D. 30*l.* in cash, and ten promissory notes for 25*l.* each, payable at different dates, on account of the said sum of 280*l.*, in discharge of the action, and would forbear and give day of payment to

ASSUMPSIT.—The declaration stated, that before and at the time of the promise of the defendant thereafter mentioned, one James Davison was indebted to the plaintiff in the sum of 280*l.*, and that the plaintiff had commenced an action against the said James Davison to recover the same, which action was pending at the time of the said promise of the defendant; and thereupon afterwards, to wit, on the 28th of October, 1837, in consideration that the plaintiff, at the request of the defendant, would accept and receive of and from the said James Davison the sum of 30*l.* in cash, and divers, to wit, ten promissory notes in writing, each for the payment of 25*l.*, with interest from the dates thereof respectively, and each bearing date the 28th of October, 1837, and payable at several periods after the dates thereof respectively, to wit, &c., (setting forth the times at which the notes became payable, one of them being at ten months' date,) for and on account of the said sum of 280*l.*, and in lieu and discharge of the said action,

J. D. until the notes should respectively become due, the defendant promised the plaintiff that if any of them should be returned dishonoured, and should remain unpaid for three days, and if the plaintiff should thereupon issue a ca. sa. against J. D., the defendant would surrender J. D. into the custody of the sheriff, &c., so that he might be arrested on such ca. sa.; and in default of so doing, he, the defendant, would pay the plaintiff the amount of any of the said promissory notes, as they should become due:—*Held*, on demurrer, that the agreement was not necessarily illegal, since it must be assumed that the defendant would obtain the arrest of J. D. by lawful means, as by his consent, or for a debt due to himself.

and would forbear and give days of payment to the said James Davison of the said sums of 25*l.* respectively, until the said several promissory notes respectively should be due as aforesaid, the defendant then promised the plaintiff, that if any of the said notes should be returned dishonoured, and should remain unpaid for the space of three days after the same or any of them should become due, and if the plaintiff should issue a writ of capias or detainer against the said James Davison, when any or either of the said notes so became overdue and unpaid, that he the defendant would surrender and deliver up into the custody of the sheriff of the county of Middlesex, or of some other county in England, the marshal of the Queen's Bench, or the warden of the Fleet, the body of the said James Davison, so that he might be arrested or detained on such writ of capias or detainer; and that in default of so doing, the defendant would pay to the plaintiff the amount of any or either of the said promissory notes, as they should respectively become due and payable. The declaration then proceeded to allege the receipt by the plaintiff from James Davison, of the 30*l.* and the ten promissory notes, on account of the debt of 280*l.*, and that the plaintiff, in pursuance of the agreement, forbore and gave days of payment to James Davison until the notes respectively became due: and that the said promissory note payable at ten months was, on the day when the same became due, to wit, on the 31st of August, 1838, duly presented to the said James Davison for payment, but was returned to the plaintiff dishonoured, he the plaintiff then and from thence hitherto being the holder of the said note; and the same having remained unpaid for the space of three days after the same so became due as aforesaid, he the plaintiff afterwards, to wit, on the 3d of September, 1838, according to the form of the statute in such case made and provided, sued out a writ of capias directed to the sheriff of the county of Middlesex, whereby, &c., against the said

Exch. of Pleas,
1839.

LEWIS
v.
DAVISON.

Exch. of Pleas,
1839.

LEWIS
v.
DAVISON.

James Davison, which said writ was marked and indorsed for bail for the sum of 26*l.* 10*s.*, the amount due on the said promissory note, and was delivered to the said sheriff to be executed: of all which the defendant had notice, and was then requested by the plaintiff to deliver up the body of the said James Davison into the custody of the said sheriff, in order that the said James Davison might be arrested by the sheriff under the said writ: yet the defendant disregarded his promise, and did not nor would surrender or deliver up into the custody of the said sheriff the body of the said James Davison, and the said James Davison hath not been surrendered or delivered into the custody of the said sheriff, or been taken or arrested by the said sheriff; and the plaintiff further says, that neither the defendant or the said James Davison hath paid the amount of the said promissory note, or any part thereof, &c.

Special demurrer, assigning for causes, first, that the contract declared on was unlawful at common law in the first branch thereof, and the defendant was under no liability to perform it; and secondly, that it did not appear on the face of the declaration, that the plaintiff had any right of suit on the note against James Davison. Joinder in demurrer.

G. T. White, in support of the demurrer.—The declaration is bad on both the grounds suggested. In the first place, it is not alleged that James Davison had indorsed any of the notes; if he did not, he would not be liable upon them to the plaintiff; and if so, no consideration is shewn for the forbearance to him, which is necessary to raise a promise from the defendant: *Jones v. Ashburnham* (a). Secondly, the contract alleged in the declaration cannot be supported in law. It does not appear but that it may be an agreement to do an unlawful act, since it is not stated that James Davison

(a) 4 East, 455.

gave his consent to his being surrendered to the sheriff on the terms stated in the declaration. The performance of the agreement may therefore lead to a breach of the peace, and cannot lawfully be carried into effect: Com. Dig. Condition, (D). 7: *Allen v. Rescous* (a), *Prat v. Phanner* (b), *Morris v. Chapman* (c), *Lowe v. Peers* (d).

Exch. of Pleas,
1839.

LEWIS
v.
DAVISON.

Humfrey, contra, was not called upon.

LORD ABINGER, C. B.—I fully assent to the general proposition which has been urged, that an agreement to do an unlawful act cannot be supported in law. But it does not appear to me that that is necessarily the effect of the agreement in the present case: and when the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act; the contrary is the proper inference. Here the contract is in the alternative; either James Davison is to be surrendered to the custody of the sheriff, or the defendant is to pay the amount of the notes. It must be presumed that James Davison was to be arrested by lawful means only; if the defendant cannot cause that to be done, he is himself to pay the money secured by the notes. The contract, therefore, is not necessarily unlawful, and cannot receive such a construction.

PARKE, B.—I am of the same opinion, that this declaration is sufficient. The case of *Allen v. Rescous* is wholly different; that was the case of a contract to beat another, which was plainly unlawful. Here the defendant has in effect undertaken to induce James Davison to consent to his being arrested,—which implies that he will obtain his consent by lawful means,—or in default of his

(a) 2 Lev. 174.

(b) Moore, 477.

(c) T. Jones, 24.

(d) 4 Burr. 2225.

Exch. of Pleas,
1839.

LEWIS
v.
DAVISON.

surrendering him, has made himself responsible on the notes. There is nothing necessarily unlawful in such an agreement.

ALDERSON, B.—I also think that this contract is not necessarily unlawful. It may well bear the construction, that the defendant will arrest James Davison for a debt due to himself, and thus enable the sheriff to detain him for the debt due to the plaintiff. And if it will bear a legal construction, that should certainly be put upon it.

Judgment for the plaintiff.

LEARMONTH, Assignee of WHITE, an Insolvent Debtor, surviving partner of ATTWOOD, deceased, v. GRANDINE.

Declaration in assumpsit by the assignee of W., an insolvent debtor, surviving partner of A., for money received by the defendant to the use of W. and A., on an account stated with W. and A., with a breach in nonpayment to W. and A., or to W. since A.'s death. Plea, as to 451*l.*, parcel, &c., that after

ASSUMPSIT.—The first count of the declaration stated, that the defendant, in the lifetime of Attwood, and before White subscribed his petition to be discharged under the act for the relief of insolvent debtors, to wit, on &c., was indebted to White and Attwood in the sum of 600*l.*, as money received by the defendant to their use. The second count was for the like sum due upon an account stated with White and Attwood. Breach, in nonpayment to White and Attwood, or to White since the death of Attwood, and before White petitioned for his discharge. There was also a third count, laying the promise to pay to White as surviving partner. Pleas, first, non assumpsit;

making the promises as to that sum, and in the lifetime of A., W. and A. were indebted to the defendant in 490*l.* for money lent, &c.; and afterwards, to wit, on &c., an account was stated between W. and A. and the defendant concerning such moneys, and the defendant then set off and allowed to W. and A. thereout the said sum of 451*l.*, parcel, &c., and exonerated and discharged W. and A. therefrom, in full satisfaction and discharge of the promises in the declaration mentioned, and of all damages sustained in respect thereof, which set-off and allowance W. and A. accepted and received from the defendant in full satisfaction and discharge as aforesaid. Replication, that W. & A. were not indebted to the defendant in manner and form, &c.:—*Held*, on special demurrer, that the replication was good, and that it was not necessary also to traverse in terms the accounting alleged in the plea.

secondly, a set-off to the whole declaration; thirdly, as to the sum of 451*l.* 18*s.*, parcel of the monies in the first and second counts of the declaration mentioned, that after making the promises in those counts mentioned as to the said sum of 451*l.* 18*s.* parcel &c., and in the lifetime of Attwood, and before White subscribed his petition &c., as in the declaration mentioned, to wit, on &c., White and Attwood were indebted to the defendant in a large sum of money, to wit, the sum of 490*l.* 15*s.*, for money lent to White and Attwood at their request, for money paid to their use, for money received by them to the use of the defendant, and for interest on monies forborne by him to them; and that afterwards, to wit, on &c., an account was then had and stated by and between the said White and Attwood, and the defendant, of and concerning the monies in this plea mentioned, in which White and Attwood were so indebted to the defendant, and of and concerning the said sum of 451*l.* 18*s.* parcel, &c.; and the defendant then set off and allowed to the said White and Attwood the said sum of 451*l.* 18*s.* out of the monies so due to the defendant as in this plea mentioned, and then exonerated and discharged White and Attwood from the payment of the said sum of 451*l.* 18*s.*, parcel, &c., and of the monies so due from White and Attwood to the defendant as aforesaid, in full satisfaction and discharge of the promises in the first and second counts of the declaration mentioned, as to the said sum of 451*l.* 18*s.* parcel, &c., and of all damages by White and Attwood sustained by reason of the non-performance thereof; which same set-off and allowance White and Attwood then accepted and received of and from the defendant in full satisfaction and discharge as aforesaid.—Verification.

Replication, that White and Attwood were not indebted to the defendant in manner and form as in the plea alleged; concluding to the country.

Special demurrer, assigning for causes, that the traverse

Exch. of Pleas,
1839.

LEARMONTH
v.
GRANDINE.

Exch. of Pleas,
1839.

LEARMONTH
v.
GRANDINE.

in the replication was not of a material and substantial fact of the defence stated in the plea, but only of an allegation which was stated merely by way of inducement; that the replication does not deny that 451*l.* 18*s.* was discharged and satisfied as in the plea mentioned, but admits the same to be true; and that the replication denies merely the consideration for the satisfaction, which, being executed, cannot be denied, except as part of, and so far as it is material to, the satisfaction.—Joinder in demurrer.

Butt, in support of the demurrer.—The traverse taken in the replication is bad, being of an immaterial allegation in the plea, namely, of the *consideration* for the agreement afterwards come to between the defendant and White and Attwood; for the consideration being executed, and not executory, cannot be traversed: *Smith v. Hitchcock* (a). It is there said—"The difference between a promise upon a consideration executed and executory is this, that in the executed you cannot traverse the consideration by itself, because it is passed, and incorporated and coupled with the promise." *Lampleigh v. Brathwait* (b), and *Young v. Rudd* (c), are authorities to the same effect. [*Parke*, B.—Your argument must go to this, that the plea would be good without any averment of the debt.] It alleges an account stated, and an agreement thereupon to set off the mutual debts; the replication should have traversed that agreement. It does not deny the existence of the debt at the time of the account stated. [*Parke*, B.—There is a question whether the plea is not insufficient, in not stating that the debt, which was the subject of set-off, existed and continued up to and at the time of the account stated.] That would be ground of special demurrer only, and has

(a) Cro. Eliz. 201.

(b) Hob. 106; Moore, 866.

(c) Ld. Raym. 60, 5 Mod. 86.

been waived by pleading over. In *Lawes v. Eastmure* (a), it was held that, in the absence of fraud, accounts which had been settled between the parties could not be opened again in support of a plea of set-off. So here, the plaintiff has no right to reply simply that there was no debt, in answer to an allegation of an account stated and balanced between the parties.

Exch. of Pleas,
1839.

LEARMONTH
v.
GRANDINE.

Knowles, contra, was stopped by the Court.

PARKE, B.—I think the plaintiff has taken the best course he could under the circumstances. The plea avers a debt due from White and Attwood to the defendant, and an account stated in respect of it; and the replication traverses the debt, the denial of which, as a necessary consequence, destroys the account stated. If there was no debt, no agreement could have been come to in respect of it. The traverse, therefore, of the debt, is in effect a traverse of the whole plea. The plea seems to me to be a tricky one, and I think the plaintiff has dealt properly enough with it.

The rest of the Court concurred.

Butt thereupon obtained leave to amend within a week, on payment of costs; otherwise

Judgment for the plaintiff.

(a) 8 C. & P. 205.

Exch. of Pleas,
1839.

HALLIFAX, Clerk, v. CHAMBERS and Another.

Declaration in case stated that the defendants were tenants to the plaintiff of a farm, and by reason thereof it was their duty, as such tenants, to manage and cultivate the farm in a good and husbandlike manner, according to the custom of the country; and assigned breaches in over-cropping, &c. Pleas, 1st, not guilty; 2ndly, that the defendants were not, nor was either of them, tenants to the plaintiff of the said messuage, &c., in manner and form as in the declaration alleged:—*Held*, that this latter plea only put in issue the fact of the tenancy, and not the holding subject to a duty to cultivate according to the custom of the country; and that the defendant could not therefore object, on this record, that a lease, under which the land had been originally taken, was not produced by the plaintiff, in order to shew that it did not exclude the custom

CASE.—The declaration stated, that the defendants heretofore, to wit, on the 8th of March, 1835, and from thence until the 2nd February 1837, were tenants to the plaintiff of a messuage, farm, land and premises, situate at Slightholme, in the county of Cumberland, and by reason thereof it was their duty as such tenants to manage, use and cultivate the said farm, lands and premises, in a good and husbandlike manner, according to the custom of the country where the said farm, &c., were so situated as aforesaid. The declaration then assigned breaches in overcropping the farm, having too large a part of the arable land in tillage at one time, and paring and burning part of the land, in the years 1835 and 1836, contrary to good husbandry and the custom of the country. The defendants pleaded, first, not guilty; secondly, that they were not nor are they, nor was or is either of them, tenants to the plaintiff of the said messuage, &c., in manner and form as in the declaration alleged; with several other pleas, to which there were demurrers. On the above pleas issues were joined.

At the trial before *Williams, J.*, at the last Carlisle assizes, the plaintiff proved payment of rent by the defendants, who were the executors of Thomas Chambers, deceased, of the farm in question, and a notice to quit given by them. It appeared, however, in the course of his case, that Thomas Chambers had taken the farm under a lease, which expired on the 2nd of February, 1836: and it was objected for the defendants, that the plaintiff could not recover without producing the lease, in order to shew the terms of holding, and whether they were inconsistent with the application of the custom of the country. The learned judge reserved the point; and the plaintiff having obtained a verdict,

W. H. Watson, on a former day in this term, obtained a rule nisi to enter a nonsuit, pursuant to the leave reserved; citing *Hutton v. Warren* (a).

Exch. of Pleas,
1839.

HALLIFAX
v.
CHAMBERS.

Cresswell and *Armstrong* now appeared to shew cause, and objected that there was no plea on the record under which the defendant could raise the point proposed.

The Court thereupon called on

Watson to support the rule. He contended that the second plea, which denied that the defendants were tenants modo et formâ as alleged in the declaration, was in substance a denial of their holding on the terms alleged, viz., subject to a duty to cultivate the land according to the custom of the country; and that the plaintiff ought therefore to have produced the lease, to shew that it did not exclude the custom.

LORD ABINGER, C. B.—I think there is nothing in the point. Unless you lay it down broadly as law, that an obligation to manage the land according to the custom of the country results in every case from the mere relation of landlord and tenant, you cannot say the point is raised. It ought to have been specially pleaded.

PARKE, B.—It seems to me that you have not included this matter, which makes the terms of the holding material, within your issue. The plea only denies the tenancy in fact, and a tenancy was proved.

ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

(a) 1 M. & W. 166.

Exch. of Pleas,
1839.

GEORGE DEWDNEY v. PALMER.

The proper time to object to the incompetency of a witness on the ground of interest is on his being called, on the voir dire, and evidence cannot afterwards be adduced to shew his incompetency.

ACTION by the indorsee against the indorser of a bill of exchange.—The pleas denied the presentment, and the notice of dishonour. At the trial, before *Gurney*, B., at the sittings at Westminster in this term, a witness was called, and sworn on behalf of the plaintiffs, as *James Dewdney*; but he was afterwards recognized to be *George Dewdney*, the plaintiff, upon which *Platt*, for the defendant, proposed to shew that he was the real plaintiff, and was about to call evidence to that fact, but it being objected that that was not one of the issues to be tried, the learned Judge refused to receive the evidence, and the plaintiff obtained a verdict.

Platt now moved for a new trial, and contended that he was entitled to establish this fact by evidence, not with reference to either of the issues, but with a view to shew the imposition practised by the witness, and thus destroy his credit.

But **PER CURIAM**.—The regular way, although in some instances the strict course may have been improperly departed from, was for you to make this objection on the voir dire, when other evidence might have been called, if necessary, to prove the incompetency, and then, if the incompetency were established, an opportunity would be afforded to the plaintiff of proving his case by other evidence.

Rule refused.

Exch. of Pleas,
1839.

EAST v. JOSEPH PELL.

COVENANT.—The declaration set out an indenture dated the 10th of August, 1834, made between the defendant and John Pell, his son, of the one part, and the plaintiff of the other part, whereby it was witnessed, that the said John Pell, with the consent of the defendant, put himself apprentice to the plaintiff, to learn his art and trade of a carpenter and joiner, and to serve him from the date of the indenture for the term of six years and eight calendar months; and that the plaintiff, in consideration of the sum of 15*l.*, at or before the execution of the indenture to him paid by the defendant, *and of the further sum of 15*l.* to be paid by the defendant to the plaintiff on the 16th of December, 1837*, in case the said John Pell should be then living and continuing with the said plaintiff, his said apprentice in the said art and trade should teach and instruct, finding unto the said apprentice sufficient meat, drink, lodging, and other necessaries during the term; for the performance of which said several covenants the parties bound themselves by the said indenture (prout patet.) The declaration then averred that John Pell, on the day and year first aforesaid, entered and was received into the service of the plaintiff as an apprentice, and so continued until, *upon, and after the said 16th of December, 1837*. Breach, that although at the commencement of the suit the day last named had elapsed, the defendant had not paid to the plaintiff the said sum of 15*l.* so agreed to be paid on that day, or any part thereof, but had therein failed and made default.

The justices at sessions have no power, under the stat. 5 Eliz. c. 4, s. 35, on making an order for the discharge of an apprentice from his apprenticeship, to direct the return of any part of the premium already paid to the master, or the non-payment of any part of it remaining unpaid.

Semble, per Alderson, B., that the statute does not apply to cases where a premium is given with the apprentice, but only to compulsory bindings without premium.

Second plea, that the said indenture was sealed and delivered by the plaintiff and the defendant, and the said John Pell, in the county of Northampton, and that the plaintiff at that time, and from thence until the time of the making of the complaint by the said John Pell as

Exch. of Pleas,
1839.

EAST
v.
PELL.

hereinafter mentioned, and at the time of the plaintiff's being bound to appear and appearing at the General Quarter Sessions as hereinafter mentioned, and of the making of the order, declaration, or writing, for the discharge of the said John Pell from his apprenticeship as hereinafter mentioned, lived and resided, and used his trade, &c., in the lastmentioned county; and that the said John Pell, until the time of his making such complaint as aforesaid, continued with the plaintiff as such apprentice in that county; and the defendant saith, that during the time aforesaid, *and before the said 16th day of December, 1837*, to wit, from the time of the making of the indenture *until the 14th day of October, 1837*, the plaintiff wholly neglected to teach and instruct the said John Pell in the said art and trade of a carpenter and joiner, and did during all that time otherwise ill use and evil intreat the said John Pell, by beating him, &c. &c.; wherefore the said John Pell, having just cause of complaint against the plaintiff, heretofore, and before the said 16th day of December, 1837, to wit, on the 14th day of October, 1837, repaired unto one H. B. T., Esq., one of her Majesty's justices of the peace for the said county of Northampton, being the county where the plaintiff then dwelt and resided; and did there, according to the form of the statute in such case made and provided, make complaint unto the said justice of such neglect of the plaintiff to teach and instruct him, the said John Pell, and of the other ill-usage and ill-treatment of him; whereupon the said justice, according to the form of the statute, summoned the plaintiff to appear before such justices as should be assembled at the next general sessions of the peace, &c., to answer the complaint of the said John Pell in the premises. The declaration stated the appearance of the plaintiff before the justice pursuant to the summons, and that the complaint was heard, and the plaintiff not consenting, but refusing to allow the justice to settle or compound, or agree the matter of complaint

Exch. of Pleas,
1839.

EAST
v.
PELL.

between the plaintiff and John Pell, the justice, for want of good conformity in the plaintiff, not being able to compound &c., did, pursuant to the statute, take bond of the plaintiff, and the plaintiff then duly entered into a recognizance before the justice for his appearance at the next general sessions of the peace for the said county of Northampton, to answer the complaint of the said John Pell, and be further dealt with according to law. And the defendant saith, that afterwards, and before the commencement of this suit, to wit, on the 4th of January, 1838, at the next general sessions of the peace for the said county of Northampton, before &c., the plaintiff, who then resided and dwelt within the said county, appeared, according to his recognizance, to answer the complaint of the said John Pell; and thereupon, upon the application of the said John Pell to be discharged or relieved, upon the neglect of the plaintiff in instructing him in his said trade, and on the ground of ill-usage and ill-treatment, certain persons [naming them], then being four of her Majesty's justices assigned to keep the peace for the said county of Northampton, of whom one was of the quorum, having, according and pursuant to the directions of the statute, heard and examined into the subject matter of the said complaint, as well on the part of the apprentice as of the plaintiff, and the plaintiff having proved nothing to clear himself of the said complaint, but, on the contrary, the said John Pell having given full proof of the truth of his complaint to the satisfaction of the said Court, and of the said justices, they the said justices did, pursuant to the statute in such case made and provided, duly testify, declare, and pronounce, by writing under their respective hands and seals, that the said apprentice should be and was thereby discharged by them, for cause of the said matters of complaint, from his said apprenticeship: *and the said Court and justices did thereby, according to the form of the statute, further order, that no part of the said premium*

Exch. of Pleas,
1839.

EAST
v.
PELL.

of 15l., paid at the execution of the aforesaid indenture of apprenticeship, should be repaid by the said plaintiff, and that no part of the said sum of 15l. which became payable to the said plaintiff on the 16th of December then last, should be paid by the said Joseph Pell (the defendant) to the plaintiff; and that that order was to be a final order between the parties, any thing contained in the indenture of apprenticeship or otherwise to the contrary notwithstanding; which said order, declaration, or writing, was afterwards, and before the commencement of this suit, to wit, on &c., duly enrolled by the clerk of the peace among the records of the sessions of the peace of the said county, and still remains filed of record there, as by the said record thereof will fully appear.

General demurrer, and joinder.

The points for argument on the part of the plaintiff were, that the Court of Quarter Sessions had no authority or jurisdiction to make that part of their order mentioned in the plea, which directs that no part of the sum of 15l. which became due from the defendant to the plaintiff on the 16th of December then last past, should be paid to the plaintiff by the defendant.

Waddington, in support of the demurrer.—This plea cannot be supported. It is framed upon the statute 5 Eliz. c. 4, s. 35 (a); but that statute gave no authority to

(a) Which enacts (inter alia), that “if any such master shall misuse or evil intreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the master, or apprentice, being grieved, and having cause to complain, shall repair unto one justice of the peace within the county, or to the

mayor or other head officer of the city, &c., where the said master dwelleth, who shall by his wisdom and discretion take such order and direction between the said master and his apprentice, as the equity of the cause shall require; and if for want of good conformity in the said master, the said justice of peace, or the said mayor or other head officer, cannot com-

the justices to make that part of the order set out in the plea, which directs that no part of the sum of 15*l.* which became payable on the 16th of December, should be paid to the plaintiff. The justices have certainly claimed and exercised the right to include in such orders, directions as to the payment or return of the premium on the discharge of the apprentice from his indentures; but no such power is given them by any words in the statute: and the authorities on the subject being conflicting, the Court will refer to the terms of the law itself, and put their own construction upon its provisions. Shortly after the passing of the act, it was contended that it gave power to the justices, besides determining the apprenticeship, to order a return of the premium (which, it may be conceded, is the same in effect as ordering the non-payment of any portion of it): and several cases were decided to that effect. Thus, in *Dillan's case* (a) the Court held, "that the justices may order a restitution of the money, within the equity of the statute:" so, in *Rex v. Johnson* (b), where one of the objections taken to an order for discharging an apprentice was, that the justices had ordered money to be returned,

Exch. of Pleas,
1839.

EAST
PELL.

pound and agree the matter between him and his apprentice, then the said justice, or the said mayor or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, to be before the justices of the said county; and upon his appearance and hearing of the matter before the said justices, if it be thought meet unto them to discharge the said apprentice of his apprenticeship, then the said justices, or four of them at the least, whereof one to be of the quorum, shall have power by authority hereof, in writing under

their hands and seals, to pronounce and declare, that they have discharged the said apprentice of his apprenticeship, and the cause thereof; and the said writing so being made and enrolled by the clerk of the peace amongst the records that he keepeth, shall be a sufficient discharge by the said apprentice against his master, his executors, and administrators; the indenture of the said apprenticeship, or any law or custom, to the contrary notwithstanding."

(a) 1 Salk. 67.

(b) Id. 68.

Exch. of Pleas,
1839.

EAST
v.
PELL.

Holt, C. J., said, "he never doubted that, for it is a power consequential upon their jurisdiction to discharge." The report of both these cases is very short, and no argument upon the point is stated. But in the case of *Rex v. Vandaleer* (a), the subject was more fully considered, and the Court came to a contrary decision. There the justices had ordered that the master should refund 3*l*. of the premium which he had received with the apprentice; but the Court, although reluctantly, on the ground that it would be an encouragement to masters to treat their apprentices ill, held, that "the statute being silent, the order must be quashed." In *Rex v. Amies* (b), *Probyn*, J., expressed an opinion that the justices might order restitution, but the case of *Rex v. Vandaleer* was not there cited: and the rest of the Court gave no opinion upon the point. In a note to *Hawkesworth and Hillary's case* (c), the cases on this subject are collected by Mr. Serjeant *Williams*, and he certainly appears to treat the point as settled by the other authorities, notwithstanding the case of *Rex v. Vandaleer*; and it does not appear that any objection was there made to the order on this ground. But there are also several statutes on this subject, that have been passed subsequently to the cases referred to, which shew that, in the opinion of the legislature, the justices had no power, under the 5 Eliz. c. 4, to order a restitution of the premium, as incidental to the power of determining the indentures. By the stat. 20 Geo. 2, c. 19, s. 3., it is provided, that where no larger sum than 5*l*. has been given upon the binding, the justices shall have power to discharge the apprentice, where misuse or cruelty of him by the master is shewn; but no power is given to order restitution of the money. But by the 4 Geo. 4, c. 29, which is entitled "An Act to increase the

(a) 1 Str. 69.

(b) 2 Barnard. 244; 1 Bott, P. L. 682.

(c) 1 Saund. 313, n, (3).

power of magistrates in cases of apprenticeship," the justices are empowered, by sect. 2, where the premium contracted for does not exceed 25*l.*, to make an order upon the master, on discharging the indenture, "to refund all or any part of the premium which may have been or shall be paid on the binding out of such apprentice, as such justices in their discretion shall see fit." It would clearly have been unnecessary to confer this limited power, if it had previously existed without limitation under the statute of Elizabeth.

Exch. of Pleas,
1839.

EAST
v.
PELL.

Secondly, even if the justices had power to make an order as to the premium, the plea is insufficient, for want of an averment that *the defendant* was any party to the proceedings before the justices, or appeared, or made any application to them for an order. The plea states that the order was to be final *between the parties*—that must mean the parties before the justices. [Lord *Abinger* C. B.—It may mean the parties to the indenture.] The justices in effect say, by their order, that no action shall be brought. They could not so dispose of the case in the absence of the defendant. [Lord *Abinger*, C. B.—He was the party benefitted by the order; his assent may be presumed.] At all events, it ought to be clearly shewn, before this equitable jurisdiction is exercised by the justices, that there is some equity in the proceeding. Here it is not so: the plaintiff would still be liable to the defendant upon the indenture, for any misconduct towards the apprentice, and could not plead this order as an answer to the action, the covenants being independent. When a sufficient case is made out, the parties would be entitled to relief in equity; *Cuff v. Brown* (a), *Newton v. Rowse* (b), *Therman v. Abell* (c): which is of itself an answer to any argument as to the necessity of this extraordinary jurisdiction being given to the justices. The cases recently decided on the

(a) 5 Price, 297.

(b) 1 Vern. 460.

(c) 2 Vern. 64. But see *Argles v. Heaseman*, 1 Atk. 518.

Exch. of Pleas,
1839.

EAST
&
PELL.

stat. 1 & 2 Vict. c. 110, may be referred to, to shew that the plain words of a statute are not to be extended to equitable considerations.

Peacock, contra.—The words of the statute, 5 E. c. 4, s. 35, are sufficiently comprehensive to warrant the decisions that have taken place upon it, and to give validity to this order. The parties are first to repair to one justice, who may decide according to his discretion and the equity of the case; he is in effect a mediator between the parties; but if *the master* refuses to conform to his recommendations, then he is to bind him over to appear at the sessions, when the justices, or four of them at the least, may pronounce compulsorily upon the case, and may discharge the apprentice from the indenture in the same way as the single justice might have done if the master had not refused to conform; they also, therefore, may decide “according to the equity of the case.” It matters not whether *the apprentice* agrees to or dissents from the proceeding of the single justice, it is only the master who has the power to make the mediation ineffectual. [Lord Abinger, C. B.—There seems no express power given to the single justice to discharge the indenture, but it is in words given to the four justices. The one justice would rather seem to have an equitable jurisdiction as a mediator between the parties, but not to put an end to the binding: then if the master will not agree to his decision, the four justices at sessions may act compulsorily, and inflict a penalty. Can we extend that penalty beyond the express terms of the statute? *Parke*, B.—It is a penal power that is given to the justices, to a certain extent, as against the master, namely, to deprive him of his apprentice; but can they make any order as to the premium? *Alderson*, B.—Under the 4 Geo. 4, c. 29, where an express power is given to order the refunding of the premium, if it is not refunded pursuant to the order, the amount may be levied by distress; but the statute of

Elizabeth gives no such power; the only proceeding therefore could be by indictment.] *Dillan's case, Rex v. Johnson*, and *Rex v. Amies*, are express authorities for the defendant. And in Bacon's Abridgement, *Master and Servant* (C), (a) it is stated—"This doctrine of refunding seems to be now established, as founded on great reason, though not expressly mentioned in the act; for the justices being authorized to discharge, according to their discretions, when the end of the apprenticeship cannot be attained with one person, it is but justice the master should return part of the money he has received with his apprentice, to place him out with a new master."

Exch. of Pleas,
1839.

EAST
v.
PELL.

Secondly, although the defendant did not personally appear before the justices, he would be equally bound by their order as the apprentice; he is as it were the same party with the apprentice, and both of them are parties to the indenture. It is stated at the end of the indenture, that "each of the parties thereto of the second part binds himself for the other of them." Upon the covenants in the indenture, and which are set out in the declaration, an action must be brought in the names of the father and the infant jointly; so, on the other hand, the remedy by the master for misconduct of the apprentice would be against the two jointly. But the defendant would be bound by the order on another ground; viz., that where by act of law one party is discharged from a covenant, the other party cannot maintain an action upon it. [*Parke, B.*—The covenants must be construed severally as to the matters to be performed by each; what joint interest have they which should oblige them to sue jointly?]

Waddington, in reply, was stopped by the Court.

LORD ABINGER, C. B.—If the authorities on this subject had been consistent, I should have been much disposed to

(a) 5 Bac. Abr. 346.

Exch. of Pleas,
1839.

EAST

v.
PELL.

think that we ought to be bound by them: but they appear to have been conflicting, and the construction put upon the statute has varied in the different cases. That of *Rex v. Vandaleer*, however, in which the point seems to have been more fully considered than in other cases, appears to us to be the most satisfactory. The question was then brought under the notice of the full Court, and all the Judges seem to have thought that the order for refunding the premium was not warranted by the statute. That case does not appear to have been cited in the subsequent one of *Rex v. Amies*. This view of the subject is confirmed by the argument derived from the statute of the 4 Geo. 4, that if the justices had already this power, it would have been unnecessary to give it them by express words. Upon the true construction of the statute of Elizabeth, I am of opinion that the justices have no power to order any restitution of the premium, where it has been paid, or, as in this case, to order that it shall not be paid. I think, therefore, that the plea cannot be supported, and that the plaintiff is entitled to judgment.

PARKE, B.—I concur in the opinion that has been given by my Lord. If this were *res integra*, and no decisions had taken place upon the statute, no doubt could be entertained on the subject, looking at the words that are used in this section of the statute. The justices have power to pronounce and declare that they have discharged the apprentice of his apprenticeship, and the cause thereof. No inference arises from that, that they can also take from the master a premium he has received, or withhold from him any part of one that may be due; that is extending the statute very much, and enabling the justices to exercise a much larger power than that of merely dissolving the indentures; namely, the depriving the master of what might be due to him for teaching the apprentice his trade for a large portion of the time. That

would be my opinion if there were no decisions on the subject: if, however, the course of decisions had been uniform in giving the justices this power, those decisions would have been binding upon us; but the authorities on the subject are conflicting. In the first cases, of *Rex v. Johnson*, and *Dillan's Case*, the opinion of the Court is very shortly delivered, to the effect that the one power is incidental to the other. In *Rex v. Vandaleer*, the point was more fully considered; and that decision does not appear to have been mentioned in the subsequent case of *Rex v. Amies*. I think, therefore, that there is not any such uniform course of decisions as to be binding upon us, but that we may exercise our own judgment in the matter. If, then, we may construe this as a modern statute, it appears to me that no power is given beyond that of discharging the apprenticeship. I do not lay much stress upon the opinion of the legislature, as supposed to be shewn in the statute of 4 Geo. 4, c. 29; besides, the power is thereby given to two justices, whereas before it was exercised by the four: but I rest my opinion principally upon the ground that there is no current of authorities obliging us to put a different sense upon the words of the statute than that which in ordinary construction they would bear.

Exch. of Pleas,
1839.

EAST
v.
PELL.

ALDERSON, B.—I am of the same opinion. If there had been a current of authorities to direct us, I should have followed them, however I might have disagreed with the grounds on which they originally proceeded. But that is not so, and I therefore concur in the opinions that have been given. And on reference to this statute, I think it is most probable that it was not intended to apply to cases where any premium was given at all. The earlier part of the section gives power to *compel* the binding of the apprentice, and if he refuses to be bound, he is to be committed until he be contented to be so; and it then proceeds

Exch. of Pleas,
1839.

EAST
v.
PELL.

to enact, that if any *such* master shall misuse his apprentice, &c., the complaint may be made to the justice meaning a master who has compelled the apprentice to come to him, and has had no premium. The whole clause leads to the conclusion that this was not an omission in the statute, but that it was intended not to apply to cases where a premium was contracted for.

Judgment for the plaintiff.

DUDDEN v. TRIQUET.

On the 14th of January, the 13th having been Sunday, the defendant, pleaded *puis darrein continuance*, a judgment recovered on the 5th of January:—*Semble*, that the plea was delivered in time, rule viii. of H. T. 2 Will. 4, having operated, under those circumstances, to extend the eight days to nine, on account of the 13th falling on a Sunday.

KNOWLES had obtained a rule to shew cause why a plea of *puis darrein continuance* should not be set aside for irregularity. The action was brought against the defendant as administratrix, and the plea alleged a judgment to have been recovered against her on the 5th of January. The plea was pleaded on the 14th of January, the 13th being Sunday. An affidavit accompanied the plea, which stated that “the plea thereunto annexed was true in substance and in fact, and that the matter therein contained arose within eight days next before this day,” viz. the 14th of January. It was objected that the plea was not pleaded within the time limited by the rule of H. T. 4 Will. 4., which provides that no plea of *puis darrein continuance* shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea.

Rowe shewed cause.—The plea is in sufficient time. The 13th having been Sunday, the eighth rule of H. T. 2 Will. 4, applies, by which it is ordered “that in all cases in which any particular time, not expressed to be clear days, is prescribed by the rules or the practice of the courts, the same shall be reckoned exclusively of the first

lay, and inclusively of the last day, unless the last day shall happen to fall on Sunday, Christmas-day, or Good Friday, or a day appointed for public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also." If, in the present case, the Court should hold that the plea ought to have been delivered on the 12th, it would make both days inclusive. In *Pepperill v. Burrell* (a), an order for seven days' time to plead was obtained on the 3th of May; on the 22nd pleas were delivered, irregular in several respects, and on the evening of that day the plaintiff signed judgment as for want of a plea; and it was held that the judgment was signed too early. In *Ryland v. Wormald* (b), it was expressly decided that the eighth rule of H. T. 2 Will. 4, applies to pleas in abatement.

Exch. of Pleas,
1839.

DUDDEN
v.
TRIQUET.

Knowles, in support of the rule.—The defendant should have applied to the Court to be allowed to plead this matter after the eight days had expired. The affidavit appears on the face of it to be false. [*Parke*, B.—The defendant means that the matter arose within eight legal days according to the rule. It should have stated that it arose within nine days, the last of the eight having been Sunday.] It clearly appears that the eight days have been exceeded.

PARKE, B.—In the present case we cannot set aside the plea. If the meaning of the rule H. T. 4 Will. 4, is, that every plea puis darrein continuance shall be accompanied by an affidavit that the matter thereof arose within eight days, then here there is such an affidavit. But if the rule means that every matter since the last continuance shall be pleaded within eight days from the time it occurred, then the general rule applies, which prescribes that one day shall be taken exclusively and the other in-

(a) 1 C. M. & R. 372.

(b) 2 M. & W. 393.

Exch. of Pleas,
1839.

DUDDEN
v.
TRIQUET.

clusively, unless the last day should happen to fall on Sunday, in which case that day also is to be excluded. My present impression is, that the effect of that rule is to extend the time of pleading in this case to nine days. But it is unnecessary to decide that point, because here we do not know but that the plea was pleaded within the eight days.

Rule discharged.

DAVIS v. LOVELL.

Declaration in case against a witness, for disobedience to a subpoena, alleged that a certain issue came on to be tried before the Justices of Assize, at Taunton, on the 31st March, 1838; that the plaintiff before then sued out a writ of subpoena duces tecum, directed to the defendant, commanding him to appear before the Justices of Assize, at Taunton, on Saturday the

CASE.—The declaration stated, that before the committing of the grievances thereafter mentioned, to wit, on &c., a certain action of trespass and ejectment was pending in the Court of Exchequer at Westminster, wherein one John Doe, on the demise of the plaintiff, was the nominal plaintiff, and one W. Green was defendant; and such proceedings were had in the said action, that afterwards, to wit, on the 31st of March, 1838, before certain Justices of Assize and Nisi Prius, to wit, at Taunton, in the county of Somerset, a certain issue, before then joined in the said action, *came on to be tried* before a jury of the county, chosen, tried, and sworn for that purpose: and whereas also, before the trial of the said issue, and also before the committing of the grievances, &c., to wit, on &c., the now plaintiff prosecuted out of the Court of

31st of March then instant, *and so from day to day until that cause should be tried*, and produced, at the time and place aforesaid, certain documents therein specified; which writ the plaintiff, before the trial of the said issue, to wit, on the 2nd of April, 1838, served on the defendant; and that although the appearance of the defendant *was necessary and material on the said trial of the said issue*, and although the defendant *could and might have appeared at the trial of the said issue*, and produced the documents, and although they were material evidence for the plaintiff, yet the defendant did not appear, &c.; by reason whereof the plaintiff was forced to become nonsuited:—*Held*, on general demurrer, 1st, that it sufficiently appeared that the trial had at the Assizes was the same as that mentioned in the subpoena; and, 2ndly, that it was sufficiently shewn that the plaintiff had a good cause of action in the original suit.

Held, also, that as the subpoena required the defendant's attendance on the first day of the Assizes (the 31st of March), and so from day to day until the cause should be tried, an action might be maintained for disobedience to it, although it was not served until the 2nd of April, the cause not having been then tried, and the defendant being so informed at the time of service, and having then a reasonable time for attending the trial.

Exchequer at Westminster, her said Majesty's writ of subpoena, directed to the now defendant and one John Doe, by which said writ our Lady the Queen commanded the now defendant to appear before her Justices assigned to hold the assizes in and for the county of Somerset, at Taunton, in the said county, on Saturday *the 31st day of March then instant, and so from day to day until that cause should be tried*; and that he should bring with him and produce, at the time and place aforesaid, a certain mandate of induction, under the seal of the late Lord Bishop of Bath and Wells, &c. [setting out several documents]; which said writ the plaintiff afterwards, and before the committing of the grievances as thereafter mentioned, *and before the trial of the said issue*, to wit, on the *2nd day of April* in the year aforesaid, caused to be made known and shewn to the now defendant, and then caused a copy thereof to be left with the now defendant, and then tendered and offered to the now defendant a certain sum of money, to wit the sum of 5*l.*, being a reasonable sum of money for his costs and charges in and about his attendance as a witness, according to the tenor of the said writ of subpoena: and although the appearance of the said defendant *was necessary and material to the said trial of the said issue*, and although the defendant *could and might*, in obedience to the said writ of subpoena, have appeared at the trial of the said issue, and could and might, in obedience &c., have produced and shewn forth, or caused to have been produced and shewn forth, *at the time and place aforesaid, on the said trial of the said issue*, the said documents so mentioned and referred to in the said writ of subpoena as aforesaid; and although the production and shewing forth of the said documents were material evidence for the now plaintiff on the said trial, whereof the now defendant then had notice: Yet the defendant, not regarding his duty, &c., did not nor would appear, or produce and shew, or cause to be produced and shewn

Exch. of Pleas,
1839.

DAVIS
LOVELL.

Exch. of Pleas,
1839.

DAVIS
v.
LOVELL.

forth, the said documents so mentioned and referred to in the said writ of subpoena as aforesaid, or either of them, although the now defendant was there solemnly called upon for that purpose, and had no reasonable or lawful cause or employment to the contrary, but thereupon wholly neglected and refused so to do; *by reason whereof* the plaintiff was then forced and obliged to allow the nominal plaintiff to become, and he was then, nonsuited in the said action; and such proceedings were thereupon had, that afterwards, to wit, on the fifth day of November in the year aforesaid, it was ordered by the said Court, pursuant to a rule of court before then made between the parties, that the plaintiff should pay the costs, &c. &c.

Plea, that the said assizes at which the defendant was required by the said writ of subpoena to attend and produce the said documents, and testify as aforesaid, commenced and were held at Taunton, in the said county, on Saturday the 31st day of March in the year aforesaid, that day being the day and year in the subpoena in that behalf mentioned; and that after the expiration of the said 31st day of March, to wit, on the 2nd of April in the year aforesaid, and not before, the plaintiff for the first time caused to be made known and shewn to the defendant the said writ of subpoena, and caused a copy thereof to be left with him as aforesaid, he the defendant then being at Wells, in the said county, at a great distance, to wit, thirty miles from Taunton aforesaid.—Verification.

Replication, that the plaintiff caused the said writ of subpoena to be made known and shewn to the defendant, and a copy thereof to be left with him, on the said 2nd day of April in the year aforesaid, as in the said declaration and in the said plea alleged; that the trial of the said issue in the declaration mentioned took place and was had *after the service* of the said writ of subpoena, to wit, on the 6th day of April in the year aforesaid, and not before; and that *at the time of the said service of the said writ of*

subpœna, the defendant had notice that the said issue had not been tried; and that a reasonable time elapsed after the service of the said writ of subpœna, and before the said trial of the said issue, wherein the defendant could and might, in obedience to the said writ of subpœna, have appeared at the said trial of the said issue, and could and might, in obedience to the said writ of subpœna, have produced and shewn forth, and caused to be produced and shewn forth, on the trial of the said issue, the said documents so mentioned and referred to in the said writ of subpœna, and thereby so required to be produced and shewn forth, as in the declaration mentioned.—Verification.

*Exch. of Pleas,
1839.*

DAVIS
v.
LOVELL.

Special demurrer, assigning for causes, that although the replication does not traverse that the said assizes at which the defendant was required by the said writ of subpœna to attend, and produce the said documents and testify as aforesaid, was held at Taunton, in the county aforesaid, on Saturday the 31st of March in the year aforesaid, being the day in the said subpœna in that behalf mentioned, as alleged in the plea; yet the replication confesses and admits that the plaintiff, after the expiration of the said 31st of March, to wit, on the 2nd of April in the year aforesaid, and not before, caused to be made known and shewn to the defendant the said subpœna, and a copy thereof to be left with him as aforesaid: that it is not alleged, nor does it appear, that the said assizes in the said subpœna mentioned, were continued after the 31st day of March, at the time of and after the service of the said subpœna as aforesaid, or that the defendant had any notice thereof; and that it is not alleged, nor does it appear, that the defendant could or might, in obedience to the said subpœna, have appeared at the assizes therein mentioned; nor that he had any notice that the said issue would be tried at the said assizes, after the service of the said subpœna as aforesaid; nor that the

Exch. of Pleas,
1839.

DAVIS
v.
LOVELL.

trial of the said issue did in fact take place at the said assizes in the said subpoena mentioned, and not at a subsequent or other assizes, &c.

Joinder in demurrer.

Butt, in support of the demurrer.—First, the declaration is bad on general demurrer, upon several grounds. In the first place, the subpoena not having been served on the defendant until after the day named in it for his appearance in Court, no action can be maintained against him for disobedience to it. The time laid in the declaration is material: and if it be said that the assizes were continued from the 31st of March until after the day of service of the subpoena, that ought to have been expressly averred. Neither does the declaration state that the cause was tried at the same assizes; nor that the defendant had notice, when he was served, that it had not then been tried, and that he could have appeared according to the exigency of the writ. In contemplation of law, the commission day is the whole assize. — Again, it is not averred that the plaintiff had a good cause of action, and that the production of the documents in question by the defendant would have enabled him to obtain a verdict. [Lord *Abinger*, C. B.—The declaration avers, that “by reason thereof the plaintiff was forced and obliged to allow the nominal plaintiff to become, and he was then, nonsuited.”] It does not aver that he was nonsuited from that cause only. All the precedents contain an express averment that the particular evidence withheld would have enabled the party to obtain a verdict. Thus, in *Masterman v. Judson* (a), it was averred that by reason of the non-appearance of the witness, and on no other account whatever, the plaintiffs were nonsuited. So, in *Amey v. Long* (b), there was an allegation that the plaintiff had a good cause

(a) 8 Bing. 224; 1 M. & Scott, 367.

(b) 9 East, 473.

of action. Without some such averment, it does not appear that the plaintiff has sustained any injury. [*Alderson*, B.—According to your argument, if there were five witnesses, the evidence of each of whom would be essential to give the plaintiff a verdict, all of them might stay away, and each of them might make the absence of the other four an excuse for his own disobedience to the subpoena]. In that case the plaintiff might withdraw the record, and then bring an action against each or any of them; but here the allegation is, that he failed *at the trial* for want of evidence. [*Parke*, B.—This objection seems rather to go to the amount of the damage than to the right of action. In *Mullett v. Hunt* (a), it was held that, after verdict, an express averment that the plaintiff had a good cause of action was not necessary, but it was sufficient if it appeared that the witness subpoenaed could have given material evidence, and that the plaintiff could not safely proceed to trial without his evidence.] The allegation there was, that by reason of the non-attendance of the defendant, and because the plaintiff could not safely proceed to trial without his evidence, he was obliged to withdraw the record; such was held to imply that the plaintiff had a good cause of action.

But the plea affords a complete answer to the action, since it states expressly that the subpoena was not served until after the day named in the writ. [*Parke*, B.—The subpoena requires the defendant to attend, not only on the 81st of March, but from day to day until the cause shall be tried: then is it not sufficient if it be served a convenient time before the actual time of trial?] In *Alexander v. Dixon* (b), it was held that an attachment could not be granted for disobedience to a subpoena served after the day named for appearance in the writ. [*Parke*, B.—That decision was upon the ground that it was not shewn

Esch. of Pleas,
1839.

DAVIS
v.
LOVELL.

(a) 1 C. & M., 752.

(b) 1 Bing., 366.

Exch. of Pleas,
1839.

DAVIS
v.
LOVELL.

to the Court that the witness had notice that the cause was not yet tried. Here (even if the case of an attachment were the same as that of an action, which it is not) it is expressly averred in the replication that the defendant, when served, had notice that the cause was not tried, and that he might have produced the documents at the trial in obedience to the subpoena.]

Barstow, contra, was directed to confine himself to the question, whether it was sufficiently averred in the declaration that the cause was tried at the same assizes.—The identity of the assize sufficiently appears, at least on general demurrer. The declaration states, that a certain issue was joined between the parties, and came on to be tried before the justices of assizes at a certain place and time, viz., at Taunton, on the 31st of March, 1838: then the subpoena requires the defendant to appear before the justices at that time and place; and it is then averred that the defendant “could and might have appeared at *the said trial of the said issue*, and have produced *at the time and place aforesaid*, on the said trial of the said issue, the said documents.” [He was then stopped by the Court.]

LORD ABINGER, C. B.—The only point on which we entertained any doubt was, whether the identity of the trial with that mentioned in the subpoena was sufficiently averred. We think, however, that it appears by necessary intendment from the record to have been the same, for the declaration states that the subpoena was to appear at a certain place on a certain day, and that he might have appeared and produced the documents “at the time and place aforesaid, on the said trial of the said issue.” As to the necessity of an averment that the plaintiff had a good cause of action in the original suit, I think the case of *Mullett v. Hunt* is an authority for our holding this declara-

tion sufficient in that respect, and that the good sense of the matter is with the observation of Lord *Lyndhurst* in that case, that no evidence can be material in a cause, unless the plaintiff has a good cause of action; and therefore that is sufficient to aver that the evidence of the party was material and necessary on the trial, and that for want of it the plaintiff was nonsuited. With this averment, the plaintiff could not support the declaration, unless he proved that he had a good cause of action in the original suit.

Exch. of Pleas,
1839.

DAVIS
v.
LOVELL.

. PARKE, B.—I am of the same opinion. With regard to the first objection, that the declaration contains no sufficient averment of the identity of the cause tried with that mentioned in the subpoena, I had for some time considerable doubt whether the declaration was not defective, and I am still disposed to think that it would have been bad on special demurrer. But the defendant, on the present occasion, can only take advantage of such objections to the declaration as arise on general demurrer; and I think enough is stated on this record to shew in substance that the trial of the same issue really took place at the time and place mentioned in the subpoena; for the declaration states, that the defendant did not appear “at the time and place aforesaid, on the trial of the said issue,” which is equivalent to an express averment that the issue was tried at the time and place aforesaid. The next objection is, that there is no averment that the plaintiff had a good cause of action in the original suit. It is not necessary, in the present case, directly to decide whether such an averment is material or not; possibly, as the attendance of a witness in obedience to a subpoena is a duty cast upon him by law, the service of the subpoena may of itself impose upon the witness the duty of obedience. If, on the other hand, it be not sufficient for the party to have brought an action, but he must moreover have had a good cause of action for bringing it, as appears

Exch. of Pleas,
1839.

DAVIS
v.
LOVELL.

to be the opinion of Lord *Lyndhurst* and *Bayley*, B., in *Mullett v. Hunt*, still the averments in this declaration are such as would, on the authority of that case, impose upon the plaintiff proof of the existence of such good cause of action. It is here averred that the attendance of the defendant was necessary and material at the trial, and that the documents in his possession were material evidence for the plaintiff. These allegations, according to the authority of *Mullett v. Hunt*, are sufficient after verdict. It is suggested also that it is not alleged that the plaintiff was nonsuited through the defendant's fault *only*, and that the cause may have failed through the absence of other witnesses as well as of the defendant: but that objection goes only to the amount of damages; for it admits the existence of a breach of duty, the quantum of damage resulting from which must be ascertained by the facts of the particular case. Upon the whole, therefore, I think the declaration is good on general demurrer. A further question is then raised by the facts appearing upon the plea and replication, viz. whether an action will lie at all for disobedience to a subpoena requiring the attendance of the party on the 31st of March, but not served until the 2nd of April. Whether an attachment would be granted in such a case is quite a different question; but upon the matter now before us, it appears to me that if the subpoena be served so late as to render compliance with it on the first day of the assizes impossible, yet as the mandate of the writ is to attend "from day to day till the cause shall be tried," the duty of the witness continues from day to day until the trial. I am of opinion, therefore, that the plaintiff is entitled to judgment.

ALDERSON, B., concurred.

Judgment for the plaintiff.

Exch. of Pleas,
1839.

TRIPP and Others, Assignees of BENNETT, a Bankrupt,
v. ARMITAGE and Others.

TROVER for deal sashes, linings, shutters, boards, and other building materials. Pleas, first, except as to certain doors, linings, boards, &c. specified in the plea, not guilty; secondly, as to the causes of action to which the first plea was pleaded, that the plaintiffs were not possessed of their own property as assignees, of the goods and chattels to which the first plea was pleaded, or any part thereof, in manner and form, &c.; thirdly, as to the causes of action relating to the conversion of the goods and chattels particularly mentioned in and excepted by the first plea, payment into court of 129*l.*, which the plaintiff took out of court in discharge of those causes of action. At the trial before Lord Abinger, C. B., at the last Gloucestershire Assizes, the following appeared to be the facts of the case:—

In the year 1837, a company was formed for the erection of a new hotel in Cheltenham, and a deed was executed

B., a builder, contracted with A. and others, trustees of a new hotel about to be erected by a company of proprietors, to build the hotel, except as to the ironmonger's, plumber's, and glazier's work, for a specified sum, and covenanted to complete certain portions of the work within certain specified periods, being paid by instalments at corresponding dates; and that if he should neglect to complete any portion within the time limited,

he should forfeit and pay the sum of 250*l.* as liquidated damages. The agreement then contained a clause empowering the trustees, in case (inter alia) B. should become bankrupt, to take possession of the *work already done* by him, and to put an end to the agreement, which should be altogether null and void; and that the trustees, in such case, should pay B. or his assignees only so much money as the architect of the Company should adjudge to be the value of *the work actually done and fixed* by B., as compared with the whole work to be done. The course of business during the progress of the work was for the clerk of the works to inspect every article which came in under the contract, and none were received except on his approval. After the works had proceeded some time, B. became bankrupt. Before his bankruptcy, certain wooden sash-frames had been delivered by him on the premises of the Company, approved by the clerk of the works, and returned to B. for the purpose of having iron pulleys, belonging to the trustees, affixed to them; and at the time of the bankruptcy, these frames, with the pulleys attached to them, were at B.'s shop. He afterwards, but before the issuing of the fiat, re-delivered them to the trustees; and the sash-frames being afterwards demanded of them by B.'s assignees, they gave an unqualified refusal to deliver them up.

Held, 1st, that the property in the wooden sash-frames had not passed to the trustees at the time of the bankruptcy:

2ndly, That they were not entitled to retain them under the agreement, as being *work already done*, they not having been *fixed* to the hotel; but that even if they were within that clause of the agreement, it could not bind the assignees, inasmuch as their right accrued on the bankruptcy, whereas the option of the trustees was not to be exercised until after the bankruptcy:

3rdly, That the refusal of the trustees not having been limited to the *pulleys*, the demand and refusal were sufficient evidence of a conversion by them of the wooden sash-frames, so as to entitle B.'s assignees to recover them in trover.

Esch. of Pleas,
1889.

TRIPP
v.
ARMITAGE.

for regulating the affairs of the Company, by which the defendants were appointed trustees. Advertisements having been issued for tenders for building the hotel, the bankrupt Bennett, who then carried on business as a builder and timber-merchant in Cheltenham, sent in a tender, and entered into a written contract with the defendants, therein described as trustees of the Cheltenham Hotel Company, dated 3rd March, 1837; by which, after reciting that Messrs. Churchill and Mallory had agreed to do the smith's and ironmongery work, and Mark Barrett the painting, plumbing, and glazing, by agreements of even date therewith, and that Bennett had agreed to do all the work, save as aforesaid, at the price of 15,381*l.* 8*s.* 4*d.*; it was witnessed, that Bennett thereby covenanted for himself, his heirs, executors, and administrators, with the defendants, that he would build the hotel (except as aforesaid), and render the same fit for habitation, to the satisfaction of R. W. Jearrad (the architect employed by the defendants) by the times therein mentioned, (enumerating various times by which specified portions of the work were to be completed): that should Bennett neglect to complete any one portion of the work by the time therein appointed, or several portions of the works by the times therein respectively appointed, *he should forfeit and pay the sum of 250*l.*, as liquidated damages*, and the defendants should be entitled to set it off, &c. The agreement then contained the following clause:—"And further, that should the said T. H. Bennett, his executors or administrators, at any time or times, omit to go on with or neglect to do the said works, matters, and things hereby agreed to be done by him, so expeditiously as he might do in the judgment of the said R. W. Jearrad, or the said architect of the said Company for the time being, *or in case the said T. H. Bennett should become bankrupt or insolvent, or being arrested should go to gaol, before the said work should be completed and finished, then and in any or either of*

such cases, it should and might be lawful to and for the said trustees, their heirs or assigns, *to take possession of the work then already done* by the said T. H. Bennett, and to avoid and put an end to that agreement; and thereupon the several clauses and agreements therein contained on the part of the said trustees should be absolutely null and void, to all intents and purposes whatsoever; and further, that the said trustees should pay to the said T. H. Bennett, his executors or administrators, or his or their assignee or assignees, as the case might be, so much money, and only so much money, as the said R. W. Jearrad, or other the architect for the time being of the said Company, *should adjudge to be the fair worth of the work actually done and fixed by the said T. H. Bennett*, his executors or administrators, to the hotel, as compared with the whole work to be done for the said price of 15,381*l.* 8*s.* 4*d.*" Proviso, that should the trustees require any additions to or alterations in the buildings, or the mode of doing the same, and should by writing under the hand of one of them, countersigned by Jearrad, direct the same to be done, then such additions or variations should be made, but should not in any respect vacate, alter, annul, or make void the agreement, but the difference caused by such additions or variations should be valued by Jearrad, and should be paid to or allowed by Bennett, as the case might be. The trustees then covenanted to pay the money by instalments, at certain dates corresponding with the times at which the specified works were to be performed. There was also a proviso, making the doing of the works conditions precedent to payment, and the architect's certificate indispensable. Certain additional works were contemplated as the building proceeded, which Bennett also undertook at stipulated prices. Previously to the month of September, 1837, Bennett received the five first instalments as they became due, upon a certificate of Jearrad, the architect, that the work had been

Exch. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

Each. of Pleas,
1889.

TRIPP
v.
ARMITAGE.

done. In that month, Bennett, being pressed for money, applied to Jearrad for advances, in anticipation of the instalments not then due; and being required to give in a statement of the works done in part of the contract, he furnished an account containing, among other items, the following:—"Bricks on the ground (*i. e.* on the hotel premises), 140*l.*; joiner's work prepared, 1,000*l.*" The trustees thereupon agreed that certain advances should be made to Bennett, on the security of all the materials which were or should be brought by him upon the premises during the works, and he consequently obtained certificates from time to time from Jearrad, under which he received several sums of money for work not actually done. During the progress of the building, one Turnbull was the clerk of the works, and the course of business was for him to inspect every article that came in under any of the contracts, and none were received except on his approval. Some sash frames for the windows had been sent in by Bennett, and approved of by Turnbull, and before the bankruptcy, had been again taken from the premises to a workshop of Bennett's, for the purpose of having affixed to them some iron pulleys, which had been supplied to the defendants by Churchman and Mallory, under their contract. At the time of the bankruptcy, these sash frames, with the pulleys affixed to them, were at Bennett's workshop.

On the 22nd of November, Bennett committed an act of bankruptcy, on which a fiat subsequently issued, and the defendants were appointed his assignees. Between the 22nd and the 25th of November, the sash frames, to which the pulleys had been so attached, and also the various articles excepted out of the first plea, were delivered upon the premises of the Company. There were also on the hotel premises, at the time of the bankruptcy, a large quantity of other materials which had been sent in from time to time by Bennett, and which had been ap-

proved of by Turnbull, and were in a prepared state, but not yet fixed. On taking an account between the value of the work actually done and fixed at the time of the bankruptcy, and the money received by Bennett up to that time, it appeared that he had been paid in advance about 800*l.* beyond the value of such work. The present action was brought by the assignees to recover the value of the materials which were upon the premises, unfixed, at the time of the bankruptcy, of the sash-frames, and of the other materials delivered on the premises after the bankruptcy. These last, however, were satisfied by the 129*l.* paid into Court and taken out by the plaintiffs. On the materials delivered before the bankruptcy the defendants claimed a lien, as being the security on the faith of which the advances had been made by Jearrad to the bankrupt; and they also claimed the property in the sash-frames, as being specific articles which had been appropriated by them, and approved on their part by Turnbull, and to which their pulleys had been attached. The only evidence of a conversion of the sash frames was a demand and refusal, the demand not being limited in terms to the wood-work of the frames. The value of the frames with the pulleys was 9*l.* 5*s.*; of the pulleys, 1*l.* 9*s.* The learned Judge directed the jury, that if the advances were made to Bennett on the understanding and agreement that the materials brought upon the premises should be considered as a pledge for those advances, they should find a verdict for the defendants: and he intimated an opinion that the sash-frames had been so far specifically appropriated to the defendants as to prevent the plaintiffs from recovering in respect of them. The jury found a verdict for the defendants, and the learned judge gave the plaintiffs leave to move to enter a verdict for 9*l.* 5*s.*, the value of the sash frames.

Book of Pleas,
1839.

TRIPP
v.
ARMITAGE.

Talfourd, Serjt., having, on a former day in this term, obtained a rule nisi accordingly,

plied with. And *Tindal*, C. J., there says—"If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance." But no question arises on the Statute of Frauds in the present case: first, because there is here a note in writing sufficient to satisfy the statute; secondly, the payment of the first instalment was part payment of all that was to be paid under the contract; but thirdly, this is not purely a contract for the *sale* of goods, within the meaning of the statute. There may be a contract under which chattels are furnished, which is not a contract of sale; as in the case of board and lodging at so much per week. So, this is a contract for work and labour to be done upon materials which, when complete, are to become the property of the defendants; but it is not properly a contract for the sale of goods. [*Parke*, B.—The contract is to make these several things, *and* to put them up in the hotel, and then the bankrupt is to be paid one entire sum for the whole work. The contract, therefore, is not complete with reference to these sash-frames, until they are fixed to the house, and made part of the freehold. Suppose Bennett's shop had been burnt with the frames in it, whose would have been the loss?] The articles having been actually approved and appropriated by the defendants, they could not have called upon Bennett to furnish others in case of their destruction. As soon as the approval of Turnbull was given, and the frames were combined with the pulleys, which undoubtedly were the property of the defendants, there was a designation of the specific articles to which the previous general contract was to apply, and the property passed. The criterion, however, as to the risk by fire is not perfect: it does not follow that because a party is the owner of goods, they are necessarily at his

Exch. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

Exch. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

risk: see *Bailey v. Culverwell* (a). The rule of law to be collected from the cases on this subject is, that wherever the article which is the subject of the contract is identified, either in the contract itself, or afterwards by the assent and approval of the parties, the property passes: *Atkinson v. Bell* (b), *Woods v. Russell* (c), *Elliott v. Pybus* (d), *Clarke v. Spence* (e), *Rohde v. Thwaites* (f), *Sparkes v. Marshall* (g). [Parke, B.—In all those cases there was a bargain for the specific article; here there has been none. The parties here had no intention of making any such bargain; the contract merely is, that the builder is to do the necessary work of his department for the house]. It is immaterial to the application of the rule of law, whether the contract is solely and properly for the sale of goods or not. This was not a contract to build a house; but, inter alia, to furnish sash-frames; the contract could not be performed without furnishing them. Then they were appropriated, by being incorporated with the defendants' iron-work, and approved by the party nominated by them for that purpose.

But, secondly, the defendants are entitled to retain these articles under the terms of their agreement with Bennett. The payment to him is to be measured in a particular way; then in case of (amongst other things) his becoming bankrupt, as to the work *done*, whether *fixed* or not, the assignees are empowered to take possession of it, and to rescind the agreement. By rescinding the agreement, they part only with their right to have the work *fixed* by the bankrupt. And this is the reasonable construction of the agreement; since otherwise the things

(a) 8 B. & Cr. 452, 454.

(c) 4 Ad. & E. 448; 6 Nev. & M.

(b) 8 Id. 277; 2 Man. & R. 399.

292.

(f) 6 B. & Cr. 388; 9 D. & R.

(c) 5 B. & Ald. 942; 1 D. & R. 293.

587.

(g) 2 Bing. N. C. 761; 3 Scott,

(d) 10 Bing. 512; 4 M. & Scott. 172.

339.

finished would become useless, and the labour would have been thrown away. Nor could the clause be intended to apply to the work actually fixed, since the defendants were already in possession of that. But inasmuch as the only part of the work by which the proportion of *payment* could properly be ascertained was that fixed to the premises, it is provided that they shall pay only so much as shall be adjudged to be the proportionate value of the work actually *done and fixed*. This construction is strengthened by the previous provision for the forfeiture of £50*l.* as liquidated damages, in case of non-completion of the work within the limited periods; both are provisions in favour of the defendants: by the former they guard themselves against a *voluntary*, by the latter against an *involuntary*, abandonment of the work before its completion. If the first branch of this clause stood alone, the defendants would be bound to pay for work done, though not fixed; but that responsibility is limited by the subsequent words; and it is reasonable that the defendants should be at liberty to take possession of the work done, but not fixed, without payment; since other persons' work would have been incorporated and wrought up with it, and the defendants must, in the case of bankruptcy, be great losers at all events.

Book of Pleas,
1839.

TRIPP
v.
ARMITAGE.

But, thirdly, at all events the *whole* of the sash-frames, as demanded, did not belong to the plaintiffs as assignees of Bennett; and if the defendants were tenants in common with them, or had any interest in the chattel, the plaintiffs cannot recover. Now here the defendants' pulleys were lawfully combined with the wood-work, under a contract which the bankrupt was bound to perform: the defendants were bound to furnish the pulleys, the bankrupt to furnish the wood to be combined with them. Suppose three-fourths of the wood were the defendants', and the bankrupt had worked up one-fourth of his own wood with it, could it be said that the whole would vest in him? The

Exch. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

pulleys, when put in, became an integral part of the whole frame, and it cannot be said that the defendants have no interest in the article so combined. If they have any interest, there is no conversion by their merely taking and using it, if they do not sell or destroy it : *Fennings v. Lord Grenville* (a). A demand and refusal is in such case, therefore, no evidence of a conversion. And this defence may be taken under the plea of not guilty : *Stancliffe v. Hardwick* (b). So also, the possession denied by the second plea means a possession as against the defendant : *Owen v. Knight* (c). Where the defendant has a lien or other qualified right in the chattel, and insists upon it, or when he has only dealt with the article in a manner which he was entitled to do in exercise of such right, that is not a conversion, in the sense in which it is necessary that it should be denied by a special plea, under the new rules : *Verrall v. Robinson* (d). In *Hartfort v. Jones* (e), it was held that a special plea in trover, setting up a lien for salvage, was bad, because it did not confess a conversion, and therefore amounted to the general issue. And the new rules give no new meaning in law to the word *conversion*, but only require that that which amounts in fact to a conversion shall be denied specially.

R. V. Richards, (with whom were *Talfourd*, Serjt., and *W. J. Alexander*,) in support of the rule, was desired to confine himself to the two points, as to the construction of the agreement, and the effect of the partial interest of the defendants in the frames.—The case for the plaintiffs was rested at the trial mainly on the ground that the property in the goods had not passed under the agreement, and that the whole frames, with the ironwork attached, being on Bennett's premises at the time of the bankruptcy, passed to his assignees as being in his order and disposi-

(a) 1 Taunt. 241.

(b) 2 C. M. & R. 1.

(c) 4 Bing. N. C. 54.

(d) 2 C. M. & R. 495.

(e) Lord Raym. 393.

tion. The defendants handed over the iron-work to him, and permitted him to work it up into his own wood. If they allow him so to use their materials as that the world would give credit to him upon the faith that they were his own,—although they may not be in his possession for the purpose of sale—the case falls within the bankrupt act. The question then is, whether these goods were bound by the contract, so as not to be in the order and disposition of the bankrupt. Now the construction of the agreement contended for on the other side would be very inconvenient, and might be very unjust: since materials worth only 10*l.* might be actually fixed, but work of the value of 500*l.* might be all finished preliminary to the building, and upon that construction the trustees would get all the latter for nothing: and that, not merely on the bankruptcy of Bennett, but even on his going to gaol, though but for a single day. But the words of the contract are clear: there is no provision for *making* sash-frames; the work provided for is the *fixing* sash-frames, with the other builder's work; therefore the work is not *done* until *fixed*. If Bennett *wilfully* omits to complete the work, he is to pay a specified penalty; but if, without wilful default, he is *unable* to complete it, the trustees have the option of rescinding the contract, paying for the work done, without his being subject to any penalty. But the reasonable construction is, that all that they take they should pay for.

It is next said that the defendants' interest in the completed chattel, which entitles them to the possession of it as much as the plaintiff, is an answer to the action. But it was admitted at the trial that the demand and refusal amounted to a conversion, otherwise the plaintiffs would have been entitled to go to the jury as to the intent with which the frames were taken. But if the possession of the *wood-work* belongs to the plaintiffs, that is sufficient to entitle them to recover. The declaration is only for the deal sash frames, and does not include the iron pulleys at all.

Exch. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

Exch. of Pleas,
1889.

TRIPP

v.

ARMITAGE.

The defendants might have removed the iron-work, which was a mere adjunct, and restored the frames themselves. [He was then stopped by the Court.]

LORD ABINGER, C.B.—I have been much disposed, I confess, to endeavour to find some possible ground for sustaining the verdict, because I consider this to be one of the hardest cases that ever occurred. The defendants undoubtedly intended to pay money into court to cover all matters on which there was any doubt, and to rest only upon a defence which was perfectly clear: and on a great part of their case, amounting to several hundred pounds, they did make out a clear defence; but there unfortunately occurred this little omission with respect to these sashes, which has given rise to the whole question now in dispute. The case has been very ably and ingeniously argued by Mr. *Maule*, but I cannot at all adopt the first ground he has taken; namely, that by reason of the approbation of Turnbull, the clerk of the works, and the application of the pulleys sent by the defendants to be fixed to the sashes, the property was appropriated to the defendants. My reason for not acceding to that argument is shortly this; that this is not a contract for the sale and purchase of goods as moveable chattels; it is a contract to make up materials, and to fix them; and until they are fixed, by the nature of the contract, the property will not pass. It is said that although the contract be general in the first instance, yet it may become by circumstances specific; that although a man may agree to buy goods generally, and on the part of the vendor the contract may be complied with by supplying any goods he chooses of the description named, yet if particular goods be afterwards pointed out and designated between the parties, the contract is thereby modified, and becomes then an undertaking to supply the specific goods, the property in which thereby passes to the vendee. But

this is not a contract to purchase goods at all—it is a contract for several works to be done. Wherever the property of the goods passes by the contract, and has become vested in the purchaser, if they are destroyed by any accident, the purchaser would be responsible. But I think we cannot say, that if these sashes had been destroyed, the purchasers, that is, the defendants, would have borne the loss: they are not bound by the contract to pay for any thing till it is put up and fixed; and if destroyed by fire, or in any way abstracted from the premises, without the fault of the builder, he would surely have a right to recover the value of such goods from the defendants. I think, therefore, that from the nature of this contract the property remained in the bankrupt, although the goods had been approved of by the defendants. That approval does not mean the assent of the parties to take the article and pay for it at once, but merely the approval of it as a proper thing to be put up. The next point was, whether, under the contract itself, this was *work done*, of which the trustees could take possession. Now, even if the contract could bear the interpretation which Mr. *Greaves* put upon it, that it was intended that the trustees should take all the materials brought, upon the premises and ready for fixing, yet I am of opinion that that was not a contract which would bind the assignees of Bennett. Supposing these to be manufactured goods, and in the possession of the bankrupt at the time of his bankruptcy, the question is, whether the contract he has made, that such goods shall become, in case of his bankruptcy, the property of other parties if they so choose, is a binding contract on his assignees. I think it is not. The bankrupt has no power to make a contract, which, after his bankruptcy, shall vest in other persons the property which, upon his bankruptcy, vested in his assignees. At the moment of the act of bankruptcy, the assignees are entitled to all he was then possessed of; and yet it is not

Exch. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

Exch. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

until then that the defendants are to exercise an option whether they will take the property or not. Then come the remaining question, whether, as the pulleys belonging to the defendants were fixed in the sashes, they had a right therefore to take possession of the sashes, and to carry them away; or, having done so, whether they had a right to refuse to deliver them up on a demand made afterwards. Now, the demand was not made of the pulleys inside the sashes, but only of the sashes. But let us see whether there was not sufficient evidence to go to the jury of a conversion by the first taking. The defendants took possession of them as of their own property: the distinction as to the right they might have to the pulleys never occurred to them, but they took possession of the whole as having a right to do so. But supposing they had discovered afterwards that they had no such unqualified right, if, when the assignees made their demand of the frames, the refusal had been a qualified one, on the ground that the pulleys were attached to them, it might be different: but as the refusal was general, to deliver the sash frames, *inter alia*, I think that must be taken to be a refusal to deliver the sash frames themselves in any state. That would be sufficient evidence of the conversion. Upon these grounds, I think the rule must be made absolute to enter a verdict for the value of the sash frames.

PARKE, B.—I entirely concur. With respect to the first point, which has been insisted upon at so much length, and with so much ingenuity and ability, by Mr *Maule*, I think the answer is a very short one. I admit that the cases which have been cited and commented upon by him are perfectly good law: but there is one most material distinction between them and the present, *viz.*, that in all those cases there was a contract with respect to a particular chattel, which by the contract was to become the property of the person taking it, under certain circum-

stances: but in this case, there is no contract at all with respect to these particular chattels—it is merely parcel of a larger contract. The contract is, that the bankrupt shall build a house; that he shall make, amongst other things, window-frames for the house, and fix them in the house, subject to the approbation of a surveyor: and it was never intended by this contract, that the articles so to be fixed should become the property of the defendants, until they were fixed to the freehold. It is said that the approbation of the surveyor is sufficient to constitute an acceptance by the defendants; but that approbation is not given *eo animo* at all; it is only to ascertain that they are such materials as are suitable for the purpose; and notwithstanding that approval, it is only when they have been put up, and fixed to the house, in performance of the larger contract, that they are to be paid for. That appears to me to be a sufficient answer to the first and principal point which has been argued by Mr. *Maule* against the rule. Then remain the other questions upon which my Lord Chief Baron has already made some observations. The first turns upon the construction of the contract: whether the trustees were or were not entitled to say that the sash frames, which were in the shop of the bankrupt, and to which their pulleys had been then applied, were within the meaning of the contract, as *work done*, of which they might take possession. Now, upon looking at the several clauses of the contract, I have satisfied my mind that these were not works done, within the contemplation of the parties. In order to understand what is the meaning of the “work done,” we must look to see what are the works contracted to be done: which is not merely to prepare the windows, &c. to the satisfaction of the surveyor, but to make them, and to fix them, when made, to the house. And this construction is certainly in accordance with the justice of the case. Bankruptcy is a misfortune—it is no longer considered in law as a crime; it is not like a wilful non-performance of

Each. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

Exch. of Pleas,
1839.

TRIPP
v.
ARMITAGE.

the contract, so as to enable the defendants to get more than they pay for: they are only to pay for the work completed and fixed, and they ought to take no more than they are bound to pay for. That seems to me to be the just and equitable view of the contract, and I therefore think that under this agreement, the defendants had no right at all to take the sashes, and that they were bound to deliver them up again upon demand. I am also strongly inclined to agree with the observations of my Lord, that even if this clause of the contract was meant to embrace movable goods, yet as it is a contract conditionally entered into, and to be acted upon at the option of the trustees, *after* the bankruptcy, how can it be said the goods do not belong to the bankrupt *at the time of* his bankruptcy? It is not as if it were the case of a fixed bargain before the bankruptcy, giving certain interest in these chattels to the defendants, and which the assignees must take subject to that interest; but it is uncertain whether the option of the defendants will be exercised or not, and in the meantime the effect of the bankruptcy is to transfer the property to the assignees. But further, (as we are in this case to take into consideration all the facts, and to give such opinion, in consequence of the reservation of the Lord Chief Baron, as a jury would), it seems to me that the wooden sash-frames must be considered as being in the apparent ownership of the bankrupt, and that on that ground also they passed to the assignees: whether the pulleys would also pass to them is a different question, but that it is unnecessary to consider. The next question is, whether in this case there has been any conversion. Upon the view I take of this contract, the original agreement between the parties, in the event that has happened, has been dissolved, and therefore as to all the materials proved to be furnished for this building, the parties remain in statu quo; then there is a window-frame which belongs to the party who furnished it,

and there are pulleys which have been put into it by the parties for whose use it was made, and which belong to them. Looking to the nature of the chattels, I should say that here the frame was the principal, and the pulleys, which are of much less value, are to be considered merely as accessory; and the parties remaining in statu quo, the only right of the defendants, the owners of the pulleys, is to have *them* back. Now as in this case we are to put ourselves into the situation of the jury, and to say what verdict they ought to have found, it appears that not only has there been a demand of the sash-frames, but we have also the fact of the whole frames being taken away bodily from the shop of the bankrupt to the premises of the defendants; that was an act inconsistent with the exercise of the defendants' right, which was merely to sever their pulleys from the frames. It then appears, that although a convenient time had elapsed to exercise that right of severance, there was a demand of the frames, and an unqualified refusal to deliver them. That was ample evidence to satisfy the jury that the frames were not taken away in the exercise of the defendants' right. It seems to me, therefore, that the conversion is made out.

Exch. of Pleas,
1889.

TRIPP
v.
ARMITAGE.

GURNEY, B.—I am of the same opinion. It is clear, upon this contract, that the property in the frames had not passed out of the bankrupt to the defendants. They had therefore no right to take possession of these frames; they had only a right to sever the pulleys from the frames, which they have not done, but have possessed themselves of both; and they make their own default in not severing the one from the other, the ground of their refusal to deliver up that which the assignees were entitled to.

Rule absolute to enter a verdict on so much
of the declaration as applied to the sash-
frames; damages, 7*l.* 16*s.*

Exch. of Pleas,
1839.

ALDERMAN and Wife v. NEATE and Others.

By a written instrument, stamped with a lease stamp, and dated the 25th of February, 1782, E. S., being seised in fee of a house and premises, agreed to demise and let them to a committee for the parish of H., and the committee agreed to accept and take them, for the purpose of converting them into a poor-house for the use of the parish of H.; to hold to the said committee, in trust as aforesaid, from the 25th day of March then next coming for the term of ninety-nine years, at the clear yearly rent of 27*l.*, payable half-yearly: and the committee agreed to pay the rent, and to keep the premises in good and sufficient repair during the term. It

was also agreed that a lease and counterpart of the premises should be prepared and executed on or before the *first of January* then next, with covenants and agreements pursuant to that contract, and such other general clauses as are usually contained in leases: and there was a proviso, that in case the committee or their successors should think it a more eligible plan to purchase the premises in fee at the price of 420*l.*, that then he the lessor should convey them accordingly. No lease was ever executed, but the premises, from the date of the instrument, were used as a poor-house for the parish of H., and the church-wardens and overseers for the time being of that parish paid the rent to E. S. and his representatives. In an action of *assumpsit* against the parish officers for the time being of the parish of H., for non-repair of the premises:—*Held*, first, that the agreement operated as a demise for the term of ninety-nine years, and not as a mere agreement for a lease; secondly, that the lease vested in the overseers of the poor by force of the stat. 59 Geo. 3, c. 12, s. 17, and that the defendants were liable.

ASSUMPSIT.—The declaration stated that Edward Sheppard was seised in fee of a certain messuage and premises called the Three Tuns Inn, in the parish of Hungerford, in the county of Wilts, and that being so seised as aforesaid, the said Edward Sheppard theretofore, to wit, on the 25th day of February, 1782, demised and let the said messuage and premises to Charles Dalbiac and others, in trust for the inhabitants at large within the parish of Hungerford, in the counties of Berks and Wilts, and that the said Charles Dalbiac &c., did thereby accept and take of the said Edward Sheppard the said messuage and premises with the appurtenances, which said messuage and premises were intended to be converted into a poor-house, for the use of the said parish of Hungerford: to hold the same unto the said C. Dalbiac, &c., in trust as aforesaid, for a certain term which was then unexpired, upon and subject amongst others to the following terms, (that is to say); that they the said Charles Dalbiac, &c., should keep the said messuage and premises in good and sufficient repair during the said term. The declaration then stated, that the said Charles Dalbiac, &c., did afterwards, to wit, on the 25th of March, 1782, enter into and upon the said messuage and premises, and became possessed thereof for the said term so to them granted as aforesaid, in trust as aforesaid, as tenants thereof to the said Edward Sheppard upon the terms aforesaid, and that they,

in consideration of the said demise, and that they had so become tenants as aforesaid, promised the said Edward Sheppard to keep the said messuage and premises in good and sufficient repair during the said term. The declaration then averred, that the premises were converted into a workhouse for the use of the said parish of Hungerford: and that Edward Sheppard, being seised of the reversion of the said premises in his demesne as of fee, died on the 2nd of September, 1800, leaving the plaintiff Margaret, his daughter and only child and heiress at law, him surviving, whereupon and whereby the said plaintiff, Margaret, became seised of the reversion of the said demised premises in her demesne as of fee; and being so seised, she, on the 21st of June, 1801, married the plaintiff Charles Alderman, and thereupon the said plaintiffs became and then were seised in fee, in right of the said Margaret, of and in the reversion of the said premises. The declaration then alleged, that during the continuance of the said term, and after the 31st of March 1819, to wit, on the first day of April in that year, the then churchwardens and overseers of the poor of the said parish of Hungerford entered into and upon the said demised premises, with the appurtenances, and became possessed thereof for the use and benefit of the said parish, and then accepted the same for and on behalf of the said parish of Hungerford, for the residue and remainder of the said term; and then, as such churchwardens and overseers of the poor as aforesaid, became and were possessed of the residue and remainder of the said term, for and on behalf of the said parish, upon and subject to the terms aforesaid, and the said residue and remainder of the said term of and in the said demised messuage and premises, with the appurtenances, then legally came to and became and was vested in the said churchwardens and overseers of the poor of the said parish and their successors, for and on behalf of the said

Erech. of Pleas,
1839.

ALDERMAN
v.
NEATE.

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

parish, according to the form of the statute in such case made and provided; and the said churchwardens and overseers of the poor of the said parish and their successors, the churchwardens and overseers of the poor of the said parish for the time being, from the day and year last aforesaid, until and at the time when the said premises became and were out of repair as hereinafter mentioned, held and enjoyed, and from thence hitherto have held and enjoyed the said demised premises with the appurtenances, for and on behalf of the said parish, as such tenants as aforesaid, upon and subject to the terms aforesaid: and the plaintiffs in fact say, that the said churchwardens and overseers of the poor of the said parish, and their successors, the churchwardens and overseers of the poor of the said parish for the time being, not regarding the said promise of the said Charles Dalbiac, &c. nor their duty on that behalf, but contriving, &c., did not nor would, nor did nor would any of them, during the said residue of the said term, or any part thereof, keep the said demised premises with the appurtenances, or any part thereof, in good and sufficient repair, according to the terms of the said demise or their duty in that behalf, but therein made default, and the said messuage and premises with the appurtenances, by reason and in consequence thereof, for a long time, to wit, on the 1st of January, 1830, and from thence hitherto, have been, and still are, in a bad and insufficient state of repair, and greatly dilapidated, &c.

The defendants pleaded, 1st. That Edward Sheppard did not demise and let unto the said Charles Dalbiac, &c., the said premises, in manner and form as in the declaration is alleged.

2ndly. That Charles Dalbiac, &c., did not enter upon and become possessed of the premises, in manner and form as in the declaration mentioned.

3rdly. That the said Charles Dalbiac, &c., did not

promise in manner and form as in the declaration alleged. *Esch. of Pleas, 1839.*

4thly. That the then churchwardens and overseers in the declaration mentioned, did not accept the said demised premises on behalf of the said parish of Hungerford, for the residue and remainder of the term, subject to the terms aforesaid, in manner and form as in the declaration alleged.

*ALDERMAN
v.
NEATE.*

5thly. That the said churchwardens and overseers of the poor of the said parish of Hungerford and their successors, for and on behalf of the said parish, did not, nor did any or either of them; hold or enjoy the said demised premises upon the terms aforesaid, in manner and form as in the declaration alleged.

6thly. That the said messuage and premises have not been and were not in a bad and insufficient state of repair, in manner and form as in the declaration is alleged.

The plaintiff took issue on these several pleas.

The cause was tried at the Summer Assizes for the county of Wilts, 1837, before *Putteson, J.*, when a verdict was taken for the plaintiffs for 100*l.*, subject to the opinion of the court on the following case.

Edward Sheppard was seised in fee of a house and premises, and in the year 1782, entered into an agreement respecting the said house and premises with Charles Dalbiac, Edward Duke, William Smith, George Church, J. Pearse, John Webb, and John Goatby, which agreement was in writing, and only stamped with a demise stamp, and is as follows:—

“Be it remembered, that it was agreed on the 25th day of February, in the year of our Lord 1782, by and between Edward Sheppard of the one part, and the before mentioned committee of the other part, as follows:—

“First. The said Edward Sheppard doth hereby agree to demise and let unto the said committee, in trust

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

for the inhabitants at large within the parish of Hungerford, in the counties of Berks and Wilts, and the said committee do hereby agree to accept and take of the said Edward Sheppard, all that messuage and tenement, with the stables, out-houses, buildings, gardens, and appurtenances thereunto belonging, called the 'Three Tuns Inn, situate, standing, and being in Charnham Street, in the parish of Hungerford and county of Wilts aforesaid, which said messuage and premises are intended to be converted to a poor-house for the use of the said parish of Hungerford: to hold unto the said committee, in trust as aforesaid, from the 25th day of March next coming, for and during the term of ninety-nine years, at and under the nett and clear yearly rent of 27*l.*, payable half-yearly by equal portions. And the said committee do hereby agree to pay the said rent accordingly; and also to pay and discharge all assessments and taxes whatsoever, with all quit-rents, rent-charges, and out-goings, for or in respect of the said premises; and also to keep the premises in good and sufficient repair during the term: and the parties do agree that a lease and counterpart of the premises shall be prepared and executed on or before the first day of January next ensuing, with covenants and agreements pursuant to this present contract, and such other general clauses as are usually contained in leases.

“ Provided, that in case the said committee, or the major part of them, or their successors, shall think it a more eligible plan to purchase in fee the said messuage and premises, for the use of the said parish of Hungerford, at the price of 420*l.*, that then the said Edward Sheppard shall accordingly convey the same premises in such manner as the counsel or attorney of the said committee shall advise and require, the said Edward Sheppard defraying all the expenses of a fine, and clearing the title up to himself, if need be, and the committee contributing a moiety of the costs and charges of the purchase deeds:

and for the true performance of this agreement, the said parties do hereby oblige themselves to the payment of the sum of 500*l.* of lawful money, to the other and others of them. Dated the day and year first before written.

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

“ EDWARD SHEPPARD.

“ CHARLES DALBIAC,” &c.

No lease was ever executed.

Edward Sheppard died in the year 1800, and the house and premises descended to his daughter Margaret, one of the plaintiffs, as his heiress-at-law. In 1801, Charles Alderman, the plaintiff, married the said Margaret.

The premises in question were, from the date of the above agreement, used as a poor-house of the parish of Hungerford. The churchwardens and overseers for the time being of the parish of Hungerford performed all the repairs thereof, and paid 27*l.* per annum for rent of the premises to Edward Sheppard, and to the plaintiffs, from the 25th of March, 1782, until the 24th of June, 1835, and all rent which subsequently accrued was paid by the officers or guardians of the Hungerford Union, formed under the provisions of the Poor Law Amendment Act.

On the 28th of September, 1835, a notice of which the following is a copy was served upon the overseers of the parish of Hungerford for the time being:—

“ Gentlemen,—

“ Kintbury.

“ I hereby give you notice to quit, on or before Lady Day next, the house, garden, and premises you hold of me at Hungerford, at the yearly rent of 27*l.* per annum. Dated 28th day of September, 1835.

“ Your obedient servant,

“ CHARLES ALDERMAN,

“ Landlord of the said house and premises.”

“ To the overseers of the poor of Hungerford, Mr. Salisbury, Mr. Langford, Mr. Little, and Mr. Mundy.”

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

The guardians of the Hungerford Union, by direction of the Poor Law Commissioners, took possession of the premises before the end of the year 1835, and continued in possession thereof until the 24th of June, 1836, when, in consequence of the above notice to quit, they delivered up a portion of the premises to the plaintiff, and agreed with him to rent the remainder on a lease, for a Board-room, and they have kept possession thereof ever since.

The last receipt for rent received of the overseers was as follows :—

“ Received 4th of November, 1835, of the overseers of Hungerford parish, six pounds fifteen shillings for a quarter’s rent of the Poor House at Hungerford, due 24th of June last.
“ CHARLES ALDERMAN.”

The subsequent rent was paid by the guardians of the Hungerford Union to the plaintiff, and the receipts were given—“ Received of the guardians of the Hungerford Union.”

On the 22nd of February, 1836, a notice of which the following is a copy was served upon the visitor and guardians of the poor of Hungerford, the parish being then managed under Gilbert’s Act :—

“ Gentlemen,—

“ I hereby give you notice that I shall require you to pay for all dilapidations which have been suffered to accrue in and to the Workhouse Buildings and premises at Hungerford, in the county of Wilts, which you, prior to the commencement of the Poor Law Union, rented of me as yearly tenants, or otherwise howsoever; and I hereby give you further notice that I shall require you to make satisfaction to me for all waste committed by you upon the said premises, during your tenancy thereof. Dated this 20th day of February, 1836.

“ CHARLES ALDERMAN.”

“ To the visitor and guardians of the
poor of the parish of Hungerford.”

The defendants were the churchwardens and overseers of the poor of the parish of Hungerford at the time the action was brought. Some of them had before served those offices, but they were not all in office together during any part of the time when the parish were in possession, nor at the time of the guardians of the Hungerford Union taking possession as before mentioned, nor at or upon the 24th of June, 1836.

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

The plaintiff's title was admitted, and the premises were admitted to be in a dilapidated state, and not in good and sufficient repair.

The question for the opinion of the Court is, whether, under the above circumstances, the plaintiffs are entitled to recover upon either and which of the issues. If the Court should be of opinion that they are, then the verdict is to stand accordingly; if not, then a verdict is to be entered for the defendants upon the several issues accordingly.

The case was argued in last Trinity term by

Erle, for the plaintiffs.—The first question is, whether this agreement operated as a present demise, or as an agreement for a future lease only; and if it operated as a present demise, whether for the term of ninety-nine years mentioned therein, or from year to year only, subject to the stipulations contained in the agreement.—First, the instrument itself operated as a lease for the term of ninety-nine years; the lessor in effect says that he lets, and the other parties say that they accept and take the premises, from Lady Day next, for the term of ninety-nine years; and the subsequent provisions of the instrument do not contradict, and are not inconsistent with, such an intention. It has been frequently decided, that a provision for a deed to be subsequently executed does not operate to prevent an instrument operating as a present demise, notwithstanding the parties contemplate this further security being afterwards given for the performance of the engagements

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

already entered into. And the case is not varied by the circumstance that all the terms as to the stipulations and covenants to be entered into, are not settled and specified. In *Doe d. Pearson v. Ries* (a), this question was much discussed, and all the cases cited; and it was there held that such an instrument operated as an actual demise. [*Alderson, B.*—In that case all the terms were definitely settled.] There are authorities which shew that that makes no difference. In *Doe dem. Walker v. Groves* (b), the contract was, that the landlord agreed to let, and also, upon demand, to execute to the tenant a lease of a farm, and the tenant agreed to take, and upon demand to execute a counterpart of a lease of the said farm, from a subsequent day for fifteen years, under a certain yearly rent; which said lease was to contain the usual covenants, and an agreement for re-entry in case of non-payment of rent, &c.; the agreement to be binding until the lease was executed. This was held to operate as a present demise, and therefore to require a lease stamp. Lord *Ellenborough*, in giving his judgment, says: “It falls within the case of *Poole v. Bentley* (c); and in *Barry v. Nugent* (d), the Court thought, notwithstanding it was agreed that leases with the usual clauses were to be drawn, that such a stipulation did not affect the words of present demise.” [*Alderson, B.*—You do not advert to *Morgan dem. Dowding v. Bissell* (e), where *Mansfield, C. J.*, says, that the question “what are usual covenants is an endless source of litigation.”] Here the only matter left without definition, is the term “such other clauses as are usually contained in leases,” which have been held not to affect the words of present demise: the rent is fixed, the term is fixed, and the commencement of it is fixed. In cases where, by the terms of the instrument, buildings were to be erected, it has been

(a) 8 Bing. 178; 1 M. & Scott,
259.

(b) 15 East, 244.

(c) 12 East, 168.

(d) 5 T. R. 165, n.

(e) 3 Taunt. 64.

held that the lessee was to have a vested interest, and that it operated as a present demise: *Poole v. Bentley* (a). At all events, this instrument operated as a demise from year to year, which is properly described in the declaration as a term which is now unexpired. [*Parke, B.*—If a tenancy from year to year was created, that allegation would not be true, because the tenancy was determined by the notice to quit. Had the declaration alleged that the term was unexpired at the time of the committing of the breaches, that would have been sufficient, but you assert the continuance of the term at the time of action brought. A tenant from year to year would be bound not to commit permissive waste; but that is very different from his obligation under a covenant to repair. Lord *Abinger, C. B.*—The parties to a parol demise, would be bound by their express contract, which is the consideration for their mutual engagements; but persons who occupied afterwards as assignees would only be bound by the implied contract which the law will raise. Is there any obligation cast upon the assignees of the original takers? *Parke, B.*—Have you any authority to shew that the reversioner may take advantage of a parol contract, as he may of covenants in an indenture, and that the assignee is bound by a parol demise, beyond that which is waste at common law? However, perhaps that is not a question raised here, as we only have to determine how the issues are to be entered. That would be a question on a motion in arrest of judgment.]

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

Then, secondly, it is intended by the 4th and 5th issues to bring under the consideration of the Court the decision in *Doe d. Jackson v. Hiley* (b), which turned on the construction to be put upon the statute 59 Geo. 3, c. 12, s. 17; and where it was held, that that statute vested in the churchwardens and overseers of the parish for the time being, all buildings, lands, and hereditaments, belonging to

(a) 12 East, 168.

(b) 10 B. & Cr. 885.

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

such parish,—not merely where the profits thereof were applicable to the relief of the poor, but where they are applicable to those purposes for which church-rates are levied;—and that, although such buildings, lands, and hereditaments, had originally been vested in trustees for the benefit of the parish. It is submitted that there is no pretence for saying that that decision was incorrect. *Phillips v. Pearce* (a) is an authority to support it; and it has been recognised by *Doe d. Higgs v. Terry* (b), and *Doe d. Hobbs v. Cockell* (c). These premises were held for the purpose of a workhouse, and for the benefit of the parish, and the parish officers are therefore liable.

Barstow, contra.—The defendants are entitled to judgment. First, as to the question of demise. It is impossible for the plaintiff to succeed on any ground but of this instrument operating as a demise for the whole term. The declaration is not framed on the limited liability of a tenancy from year to year, but proceeds entirely on the assumption of there being a demise for the term of ninety-nine years; and the plea of no demise puts in issue the demise stated in the declaration. There is nothing therefore in the point, as to the liability arising from the relation of a tenancy from year to year existing between the parties.—No case can be cited in which the instrument has been held to operate as a demise, unless in cases where it can be collected that the relation of landlord and tenant was clearly intended, without any condition whatever. In the present case, it is by no means clear that the parties contemplated that such a relation should exist between them. There is one circumstance that has not yet been adverted to, namely, that in case the committee shall think it more eligible to purchase the fee

(a) 5 B. & C. 433; 8 D.
& R. 43.

(b) 4 Ad. & Ell. 274; 5 Nev. & M. 556
(c) 4 Ad. & Ell. 478.

of the premises at a certain price, Sheppard, the intended lessor, agrees to convey them. It is left in uncertainty, therefore, whether it was intended that the relation of landlord and tenant, or of vendor and purchaser, should exist. [Parke, B.—The power of purchasing does not restrain the committee from doing so after the lease is executed: it is given to the committee or their successors, which evidently points to something remote, and shews that the time of the purchase is not to be confined to the period prior to the execution of the lease.] At all events, it is not contemplated with certainty that the relation of landlord and tenant shall exist. [Lord Abinger, C. B.—In what relation do you contend that the parties stand, until they exercise their option as to the purchase? Are they not liable to the payment of rent under the contract?] It is important to consider, whether it was contemplated that the relation of landlord and tenant should continue at all events during the term. Here the parties have the option to purchase the fee: therefore it is uncertain in that respect. But there are other circumstances, independently of this, which go to shew that this was not intended to operate as a present demise. It may be admitted that the stipulation as to a future lease is not of itself enough to prevent its so operating. But here the terms of the future lease are left in uncertainty. *Doe d. Pearson v. Ries* is no authority for the plaintiff, but rather the contrary, because there the contract was that the lease should contain the same covenants as were contained in a former lease, which made them certain by reference to such lease; and that circumstance is noticed in the judgment of the Court. The only case in which an instrument containing a stipulation for a future lease with the “usual covenants,” was held to amount to a demise, is that of *Doe dem. Walker v. Groves*; but in that case there was a stipulation that “the agreement should be binding until the lease was executed,” which was mainly relied upon. Secondly, the acts of the parties, although sub-

Exch. of Pleas,
1839.

ALDERMAN
NEATE.

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

sequent to the commencement of the lease, may be taken into consideration; and here the supposed lessor has given a notice to quit, which is quite inconsistent with his having granted a term for ninety-nine years. 'That the acts of the parties may be looked to, *Wilkinson v. Hall* (a) is an authority. There were many points determined in that case, but in the course of it *Tindal*, C. J. says (b),—"But admitting, for a moment, that the construction is doubtful or ambiguous, it seems that the parties themselves have understood and acted upon it in this sense." [Lord *Abinger*, C. B.—Can it be said that the legal intention of the instrument is to be ascertained by the subsequent conduct of the parties? All that the Chief Justice meant to say was, that the facts referred to by him strengthened his view of the intention of the instrument.]

Secondly, as to the question arising on the 4th and 5th issues. Some doubt has been thrown on the decision in *Doe v. Hiley*. It is stated, in a note to *Ex parte Amersley* (c), that in a case of the *Attorney-General v. Lewin*, the Vice-Chancellor held that copyholds were not within the stat. 59 Geo. 3, c. 12, saying that it would be very extraordinary if copyholds could be vested in the churchwardens and overseers, as a corporation, under the act, as it would deprive the lord of all his fines; and whatever might be the case as to freeholds,—which it was not necessary for him to consider,—the Court of King's Bench had not decided that copyholds were within the act, and he certainly should not do so. The note adds, that his Honour seemed to doubt the authority of *Doe v. Hiley*. The cases cited as confirmatory of it, *Doe d. Higgs v. Terry*, and *Doe d. Hobbs v. Cockell*, are not in effect so; because all that they decided was, that leases granted by parish officers *before* the 59 Geo. 3, c. 12, were not binding. But

(a) 4 Scott, 301; 3 Bing. N. C. 508.

(b) 4 Scott, 333.

(c) 2 Yo. & Coll. 352.

supposing *Doe v. Hiley* to be law, it is not applicable to the present case. The 17th section of the statute enacts, “that all buildings, lands, and hereditaments, which shall be purchased, hired, or taken on lease, by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments belonging to such parish.” The plaintiff must bring himself within the words of that section. He must rely upon the words “all other buildings, lands, and hereditaments belonging to such parish.” Now, in the year 1819, when this act was passed, this property was vested in certain persons for a term, *in trust for the parish*. How can that satisfy the words “belonging to such parish?”—But the case of *Doe v. Hiley* is not maintainable. It seems there to be assumed, that the property vests in the churchwardens by force of the statute: but the word “vest” does not occur in the statute; the words are merely “may accept, take, and hold:”—that means, when conveyed to them in trust for the parish. The preceding words of the section are “shall be conveyed, demised, and assured” to the churchwardens, &c., in trust for the parish. The same words are used in Gilbert’s Act, 22 Geo. 3, c. 83, s. 21, “may accept, take, and hold all houses for the purposes of this act,” and “accept, take, and hold grants and donations which may be made to them for the benefit of the parish:” the present statute extended this provision of corporate capacity to all parishes. The words “belonging to such parish” probably mean beneficial property as contradistinguished from legal estate. The 25th sec-

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

Exch. of Pleas,
1839.

ALDERMAN
NEATE.

tion shews, that the churchwardens and overseers were not contemplated as necessarily representing the parish in respect of *all* lands, &c. in which it might be interested, as it speaks of land, &c. "*belonging* to such parish, *or* to the churchwardens and overseers, or either of them." When it was intended that the property should *vest*, appropriate words were used for that purpose, even *before* the 59 Geo. 3: for example, in stat. 54 Geo. 3, c. 170, s. 8, to give them a property in parish securities, as bastardy bonds, and 55 Geo. 3, c. 137, s. 1, to give them a property in goods, &c., supplied for the use of the poor, the express words are used, "vested in the overseers of the poor of such parish." So in a statute passed since the 59 Geo. 3, c. 12, viz., 5 & 6 Will. 4, c. 69, s. 3, giving power to the overseers and guardians of the poor to sell, purchase, and dispose of workhouses, &c., the words used are, "belonging to any such parish or union, *or vested in* trustees or feoffees in trust for such parish." So, section 8 of the same statute enacts, "that all buildings, &c., which before the passing of this act may have been conveyed to any persons in trust for, and for the use of, any union or parishes, shall, without further account, *vest* in the guardians thereof as such corporation, in the same manner as if the same respectively had been conveyed to or vested in them under the provisions of this act." This shews that when the legislature intended that property should *vest* in the parish officers, they used appropriate words for that purpose: and the legislature not having used such language here, it is submitted that it was optional with the parish officers to take the property, and they are not liable until it is actually conveyed to them.

Erle, in reply.—No authority has been cited to shew that such an instrument as the present cannot operate as a demise; and *Doe v. Groves* is expressly in point, unless the proviso giving a power to purchase, at the end of the

instrument, has the effect of preventing its so operating. But nothing is more common than the granting of long leases with an option of purchasing during the continuance of the term.

Arch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

Lord ABINGER, C. B.—The argument of Mr. *Barstow*, as to the effect of the statute, is a very ingenious one; but we are inclined to consider that question settled by *Doe v. Hiley*. We will however consider both points.

Cur. adv. vult.

In Michaelmas term, the judgment of the Court was delivered by—

Lord ABINGER, C. B.—This was an action against the overseers for the time being of the parish of Hungerford, to recover damages for the non-repair of certain premises; and the question turns on this, whether the agreement, the foundation of the action, is to be construed as a demise, or only as a contract for a lease. It appears that, originally, an agreement, dated the 25th of February, 1782, was made with certain trustees to convey the premises in question to the use of the poor of the parish; and the contract was, that the parties were to have possession of the premises for ninety-nine years, to commence from the Lady Day then next ensuing, at a half-yearly rent of 25*l.*, with a proviso, that before the 1st of January next ensuing a lease should be executed, containing the usual covenants; and that in case the parties accepting the premises, or their successors, should think it expedient to purchase the fee-simple in the soil for a certain price, the lessor should make a conveyance to them accordingly. It was contended by the defendants' counsel, that this agreement could not operate as an absolute demise for ninety-nine years; and he urged in support of the proposition, the circumstance of its containing a stipu-

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

lation for the execution of a lease at a future period. But so many cases are to be found where agreements have been held to operate as actual demises, notwithstanding the insertion of a stipulation similar to the above, that this argument cannot be sustained. It was then suggested that it might have been optional on the part of the defendants to treat it as a lease or not; but we think, on the view of the whole instrument, that it is a question for our decision, whether or not the words it contains are sufficient to amount to a present demise, if it can be collected from the circumstances of the case, that it was the intention of the parties, at the time when it was executed, that it should be such. Here the parties agree that the term in question is to commence from the 25th of March, 1782, at a certain yearly rent; on this the question arises, when would the first year's rent become due? No one can suppose for a moment that this can be at any other period than the Michaelmas following; in which case, the term must have commenced immediately on the date of the agreement; and if so, what was the term in question, but the one for ninety-nine years mentioned in the agreement? If however the first half-year's rent be not considered as accruing due at Michaelmas 1782, it must necessarily become so at Lady Day next following; and on that construction, we are to suppose, that although the lessor created a tenancy for ninety-nine years from March, 1782, at a half-yearly rent, still no rent was to be payable till the expiration of a full year from the date, and consequently the last half-year's rent would become due at the end of a half-year after the term had expired. It is much more probable that the rent should be made payable within the term, than after its expiration, as in the latter event the landlord's remedy by distress would be gone. We think it would have been better if the Courts had not given so wide a construction to instruments of this nature; but on consideration of all the cases taken together, we cannot avoid the conclusion, that a

stipulation for the execution of a lease *in futuro* does not necessarily contradict the notion of an instrument of this description amounting to a present demise. Besides, the agreement in this case containing the stipulations usually found in actual leases, goes far to prevent the doubt and uncertainty which such an agreement might otherwise produce; and the specific agreements for repair and payment of rent amount to a proviso that the lease shall be put an end to if the rent is not paid and the repairs not performed. For all these reasons we think that the lease in this case took effect from the date of the agreement.

Exch. of Pleas,
1839.

ALDERMAN
v.
NEATE.

The next question is, whether, supposing this to be a lease, it vested in the overseers of the poor, under the 59 Geo. 3, c. 12, s. 17. That question has been ingeniously argued before us; we do not, however, consider it as being *res integra*, inasmuch as it has been decided by the Court of Queen's Bench that the statute does apply in all cases; and as the agreement here is a grant of property to be used for a poor-house, we think it is within the provisions of the statute, and accordingly that the property is vested in the overseers for the time being. Our judgment must therefore be for the plaintiffs (*a*).

Judgment for the plaintiffs.

(*a*) See *Allason v. Stark*, 1. P. & D. 183.

STRAKER v. GRAHAM and Another.

ASSUMPSIT for freight.—The defendants pleaded, 1st, *non assumpserunt*; 2ndly, except as to 17*l.* 6*s.* 6*d.*, On a motion for a new trial, the Court will not receive an affidavit by the attorney of an admission made to him by one of the jurymen, that the verdict was decided by lot.

A bill of exchange was drawn in duplicate on the 12th of August at Carbonear, in Newfoundland, payable 90 days after sight, on S. & Co. in England, for the freight of a voyage from Liverpool to Carbonear. The bill was not presented for acceptance to S. & Co. until the 16th of November. Carbonear is 20 miles from St. John's, with a daily communication between those places; and from St. John's there is a post-office packet three times a week to England, the average voyage being about 18 days:—*Held*, that the jury had properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the delay.

Exch. of Pleas,
1839.

STRAKER
v.
GRAHAM.

payment; 3dly, as to the said sum of 176*l.* 6*s.* 6*d.*, a plea stating (in substance) that Messrs. Slade, Biddle, and Co., of Carbonear, (in Newfoundland), the consignees of the goods mentioned in the declaration, on the 16th of August, 1837, delivered to the plaintiff, for and on account of the said freight, and in payment of the said sum of 176*l.* 6*s.* 6*d.*, and the plaintiff accepted, a bill of exchange, dated the 12th August, 1837, drawn by Slade, Biddle & Co., upon Messrs. Slade, Biddle & Co. of Poole, (in England), payable ninety days after sight; that the plaintiff kept the bill for an unreasonable time before it was presented for acceptance to Slade, Biddle & Co., the drawees, and that in consequence thereof, Slade & Co., who would have paid the bill if it had been presented for acceptance within a reasonable time, when it became due, were unable to pay it, and it was dishonoured. Replication to the latter plea, that the plaintiff did not keep the bill an unreasonable time, as in the plea alleged; and issue thereon.

At the trial before *Williams, J.*, at the last Liverpool assizes, it appeared that the freight sought to be recovered was in respect of a voyage from Liverpool to Carbonear; and that a bill was given in duplicate for the freight in question, at Carbonear, on the 12th August, 1837, by the agent there of Messrs. Slade, Biddle & Co., to the captain of the vessel, drawn on Slade, Biddle & Co. of Poole, the owners of the goods, payable ninety days after sight to the order of the plaintiff. Carbonear is twenty miles distant from St. John's, and there is a daily communication between the two places; and from St. John's a post-office packet sails three times a week for England, the average voyage being about eighteen days. By Quebec, the bill might have been transmitted in about six weeks. The bill was not presented for acceptance to Slade, Biddle & Co. until the 16th of November; it was then accepted by them, and would thus become due on the 17th of February, 1838. On the 30th of January, Slade & Co. stopped pay-

ment, and the bill was dishonoured when due. The captain was not called at the trial, nor was any evidence given to explain the delay in the presentment of the bill. The learned Judge, in summing up, intimated an opinion in favour of the plaintiff's right to recover; but the jury, after a deliberation of about twenty-four hours, found a verdict for the defendants.

Exch. of Pleas,
1839.

STRAKER
v.
GRAHAM.

In Michaelmas Term, *Atcherley*, Serjt., obtained a rule nisi for a new trial, on the ground that the verdict was against the evidence; and also on an affidavit of the plaintiff's attorney, that having been informed, immediately after the trial, that the verdict had been decided by drawing lots, he had applied to one of the jurymen, who had admitted to him that that was the case (*a*). The learned judge, in his report, intimated his dissatisfaction with the verdict.

Cresswell and *Cowling* shewed cause.—The verdict was perfectly right upon the evidence. This is not the case of a bill put into circulation and sold in the market, but of a bill given in satisfaction of a debt between the parties. If a party puts a bill, payable after sight, into general circulation, he is no longer responsible for the delay that may occur in presenting it to the drawee; but it is otherwise where the holder retains it in his own possession; *Muilman v. D'Eguino* (*b*). Here it appears that there was a daily communication between St. John's and Carbonear, and a regular post-office communication three times a week from St. John's to England, which is only an eighteen days' voyage; that, moreover, the bill might have been transmitted by Quebec in six weeks; yet it is not presented until the 16th of November, a period of nearly fourteen weeks from its date. And it is always to

(*a*) The Court intimated an opinion, when the motion was made, that this affidavit was inadmissible; but it subsequently ap-

peared that the rule was drawn up on reading it.

(*b*) 2 H. Bl. 565.

Exch. of Pleas,
1839.

STRAKER

v.
GRAHAM.

be remembered, that the bill being drawn in sets, *both* means of transmission might have been made available. *It* is admitted that the defendants were bound to make out that the delay was unreasonable; but they clearly established such a *prima facie* case as rendered it incumbent on the plaintiff to shew the special circumstances.

With regard to the affidavit, it is clearly inadmissible. The affidavit of the juryman himself would not be receivable: and his declaration not on oath cannot be in any *better* situation.

Alcherley, Serjt., *contra*.—There was no proof of unreasonable delay on the part of the plaintiff. The interest of the drawer is not alone to be consulted in such a case: it is his fault if, by drawing a bill payable after sight, he takes upon himself the greater chance of failure by the drawees. The defendants were bound to establish such laches, contrary to the custom of merchants, as is sufficient to cast the onus on the holder. Here there was no post office at Carbonear; and the vessel was bound for Quebec. [Lord *Abinger*, C. B.—Why was not one set sent by St. John's?] That point was not taken at the trial. The question for the jury was, whether, looking at the interests of both the drawer and the holder, there had been unreasonable delay in forwarding the bill for acceptance, or putting it into circulation: *Mellish v. Raddon* (a). The verdict was contrary to the opinion of the learned Judge, and it is evident that it was so given, only because some of the jury were worn out by exhaustion.

But the affidavit is also admissible. There are conflicting authorities on this subject. In *Owen v. Warburton* (b), the Court refused to set aside a verdict, on the affidavit of a juryman that it was decided by lot (c). But the affidavit of the juryman himself is rejected, because

(a) 9 Bing. 416; 2 M. & Scott, 570.

(b) 1 N. R. 326.

(c) See also *Vaise v. Delarch*, 1 T. R. 11; *Jackson v. Williamson*, 2 T. R. 281.

the conduct which he admits is such as would render him liable to punishment. [Lord *Abinger*, C. B.—No; it is because otherwise no verdict would be safe.] There is no rule of law which prevents the Court from getting at the knowlege of this fact as of any other, except that the juryman is not permitted to confess his own misconduct. A verdict decided by lot will be set aside, although it be according to the evidence and the opinion of the judge; *Fry v. Ward* (a), *Hall v. Core* (b). In *Aylett v. Jewell* (c), a new trial was refused because there was *no* affidavit by the jurymen themselves, but only their declaration to the attorney. [*Alderson*, B.—If such evidence were admissible, what verdict would be safe? If one of the jury is displeased at the verdict, he may say they tossed up for it; and if that be false, he is subject to no punishment].

Exch. of Pleas,
1839.

STRAKER
v.
GRAHAM.

LORD ABINGER, C. B. — I wish it to be understood clearly and distinctly, that we cannot take notice of the affidavit at all: I never meant to concur in granting the rule upon that ground, and therefore I think it ought not to have been filed. On the other point, if we doubted whether the verdict was right, then the opinion of the judge, or the length of time during which the jury were in deliberation, would be good grounds for granting a new trial; but having no doubt, we cannot act upon them; we must rather conclude that the length of their deliberation enabled the jury to come to a mature conclusion, which we think the right one. Here the bill was drawn at Carbonear, on the 12th of August, and (which is very material) drawn in duplicate: it appeared that there was a daily communication from Carbonear to St. John's, and a post-office packet from thence to England three times a week, the voyage being about 18 days: yet the bill was not

(a) T. Jones, 83.

VOL. IV.

(b) 1 Stra. 642.

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(c) 2 W. Bl. 1299.

M. W.

**Exch. of Pleas,
1839.**

STRAKER

G. GRAHAM.

presented for acceptance until the 16th of November, by which it was made to run at least two months longer than was necessary. No evidence was given to account for this delay; and for aught that appeared, the captain might have had it in his pocket for a considerable time after his arrival in this country. At all events, the bill being drawn in sets, the plaintiff might have transmitted another set of it by St. John's. I think, therefore, that the verdict was perfectly right, and ought not to be disturbed.

PARKE, B.—I think that, on general principles, we cannot attend to the affidavit. It would be very unsafe to the administration of justice, to admit hearsay in matters of this kind. When the jury have openly concurred in a verdict in open court, which ought to be their binding decision on the case, it would be most dangerous, and lead to the greatest fraud and abuse, to set it aside on such statements as that which is made in this case. I also agree that the verdict was right upon the evidence. The opinion of the learned judge at the trial is certainly entitled to the greatest respect, because he has the best opportunity of seeing the demeanour of the witnesses, and judging of the relative value of their evidence: but I cannot help thinking, that if the fact of the bill being drawn in duplicate had been brought to his notice, his impression would probably have been different. As, however, we are of opinion that a verdict the other way would have been wrong, we are bound to act upon that opinion.

ALDERSON, B.—I am of the same opinion; and I desire to express my entire concurrence in the rejection of the affidavit, because I think it important that the rule should be laid down clearly and distinctly by every member of the Court.

Rule discharged

Arch. of Pleas,
1839.**BURGHART v. HALL and Others, Executors of NISBETT,
Deceased.**

THIS was an action by the plaintiff, a tailor, to recover the amount of his bill for uniforms and other clothes supplied by him to the defendants' testator, Captain Nisbett, in his lifetime. The defendants pleaded the infancy of the testator, to which there was a replication that the goods were necessaries. The action was brought under the direction of Lord Chancellor *Lyndhurst*. At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after Michaelmas Term, 1837, it appeared that Captain Nisbett was a minor at the time when the clothes were supplied, but it was proved also that he had an allowance of 500*l.* a year, besides his pay as a captain in the Guards. The Lord Chief Baron, in summing up, expressed his opinion that if the infant had an income sufficient to provide him with necessaries suitable to his condition for ready money, he could not contract even for necessaries upon credit; and the jury, acting upon this direction, found a verdict for the defendants.

Assumpsit to recover the amount of a tailor's bill, for clothes supplied to the defendants' testator in his lifetime. Plea, infancy of the testator. Replication, necessaries; on which issue was joined. On the trial, it appeared that the testator was a minor at the time when the goods were supplied, but it was proved that he had an allowance of 500*l.* a year, besides his pay as a captain in the army. The learned Judge at the trial was of opinion that if the minor had a sufficient income allowed him to supply him with necessaries suitable to his condition for ready money, he could not

In Hilary Term, 1838, *Erle* obtained a rule nisi for a new trial, on the ground of misdirection; citing *Darby v. Boucher* (a), and *Earl v. Peale* (b), and contending that the infant might enter into any reasonable contract for necessaries, although on credit (c). In Easter Term following,

contract even for necessaries upon credit:—*Held*, that this was a misdirection.

(a) 1 Salk. 279, 286.

(b) 10 Mod. 67.

(c) The rule was granted on another ground also, viz. that Lady Nisbett, the mother of the defendants' testator, who was examined for the defendants, was an incompetent witness, being a legatee under his will to an amount

more than sufficient to exhaust all the assets. This latter point arose also in another action against the same defendants, *East v. Hall and Others*, and was argued at great length, and the Court took time until this term to consider it. The latter cause, however, was ultimately compromised, and no judg-

Rech. of Pleas,
1839.

BURGHART
v.
HALL.

Thesiger, Leahy, and Bayley, shewed cause.—The single question is, whether a suitable allowance in money made to an infant prevents a tradesman from contracting with him for necessaries on credit. In *Ford v. Fothergill* (a), Lord *Kenyon* held that it was incumbent on a tradesman, before he trusts an infant with what may appear to be necessaries, to inquire whether he were provided with a sufficient allowance by his friends; that the question of necessaries was a relative fact to be governed by the fortune or circumstances of the infant, and that proof of those circumstances lay on the plaintiff. And in *Crantz v. Gill* (b), the same learned Judge held that when a father gives his son a reasonable allowance for his expenses, he is not liable for necessaries. Here it was proved that the deceased was allowed 500*l.* a year besides his pay as a captain in the army, and that that allowance was ample for his station in life. It probably will not be disputed, that if his guardians had found him necessaries in kind, the action would not be maintainable: yet this is merely another mode in which they choose to supply him with necessaries, he being from home, and in the army. The ground of allowing an infant to obtain credit for necessaries, is that he shall not starve; but if he has sufficient money supplied to him, it is not essential that he should have credit for what might otherwise be deemed necessaries. It is no doubt the duty of the tradesman to make inquiries. It is like the case of a tradesman who trusts a married woman living apart from her husband; and as to that in *Marshall v. Rutton* (c), Lord *Ellenborough* says:—"A wife living apart from her husband, and who has property secured to her own separate use, must apply that property to her support, as her occa-

ment was therefore given. The publication of the present case was delayed in the expectation of a decision on the other point also.

(a) 1 *Esp.* 211; *Peake's N. P. C.* 301.

(b) 2 *Esp.* 471.

(c) 8 *T. R.* 547.

sions may call for it; and if those who know her condition instead of requiring immediate payment, give credit to her, they have no greater reason to complain of not being able to sue her, than others who have nothing to confide in but the honour of those they trust." Here it appeared that the plaintiff not only knew that Captain Nisbett was a minor, but was cautioned by his mother, Lady Nisbett, against trusting him. It is not competent to a tradesman to shut his eyes to the fact of the minor's having an allowance, and he cannot be allowed to dictate to the guardian the way in which he shall be supplied with necessaries. In *Bainbridge v. Pickering* (a), Gould, J., says, "No man shall take upon himself to dictate to a parent what clothing the child shall wear, or at what time they shall be purchased, or of whom. All that must be left to the discretion of the father or mother." There is no reasonable distinction between necessaries provided in kind and a money allowance, on a question whether credit has been properly given. The defendants proved not only that Captain Nisbett had an ample allowance, but that he was supplied by several tailors with clothes. In *Burghart v. Angerstein* (b), it was laid down that a minor is only liable for necessaries suitable to his state and degree, and that the jury must consider not only whether the clothes supplied to him were suitable in point of quality, but also in point of quantity; so that if he has been supplied with ten coats by another tradesman, and immediately after that the plaintiff supplies him with another, the plaintiff will not be entitled to be paid for that other coat, which was wholly unnecessary. And it was expressly decided by the Vice-Chancellor, in *Mortara v. Hall* (c), that where an infant has an allowance made to him by his guardians for his support, a tradesman is not entitled to be paid for articles supplied to the infant on credit, unless he can make out, that having regard to the

Exch. of Pleas,
1839.

BURGHART
v.
HALL.

(a) 2 W. Bla. 1325. (b) 6 Car. & P. 690. (c) 6 Sim. 465.

Exch. of Pleas,
1839.

BURGHART
v.
HALL.

infant's circumstances and station (which he is bound to inquire into) the articles were necessaries. The question before Lord *Lyndhurst*, Lord Chancellor, in this case was not the same. [*Parke, B.*—There is no doubt that Lord *Lyndhurst* doubted whether that decision was a correct one.] In giving permission to bring this action, he did no more than suggest a doubt, and the Vice-Chancellor's decision is express upon the point. His Honor says, "I take it to be the law that it is the duty of those who trust infants for goods supplied to them, to make themselves acquainted with their circumstances, in order that they may determine whether the articles supplied really are necessaries or not. The question then is, whether a tradesman would be at liberty to furnish an infant with the necessaries on credit, when he might have known, if he had made inquiry, that the infant was supplied with an income for his support. I cannot think that a tradesman would be at liberty to supply an infant so circumstanced on credit." [*Parke, B.*—There is no doubt that Lord *Lyndhurst* did not sanction that opinion.] It is not necessary here to contend that the plaintiff ought to have been nonsuited; it is sufficient to say, that the fact of the minor's being supplied with a sufficient money allowance was proper, with other ingredients in the case, to be left to the jury.

Erle, Platt, and Jardine, contra.—First, the plaintiff certainly ought not to have been nonsuited, as he was at all events entitled to recover for that portion of the demand which was clearly for necessaries. The plaintiff gave abundant evidence to call upon the defendants to shew that the articles supplied were not necessaries. It was proved that he was an officer in the Guards, that uniforms were supplied to him, and that the supplies were made with the knowledge that he was in a high rank in life, and entitled to an ample fortune on coming of age. In

Mackarell v. Bachelor (a), which was "debt upon divers contracts, all for apparel; some for fustian suits, and some for velvet and satin suits laced with gold, amounting to 44*l.*, whereof the plaintiff was satisfied 4*l.*"; the defendant pleaded infancy: the plaintiff replied, that he was one of the gentlemen of the chamber to the Earl of Essex, and so it was for his necessary apparel. On demurrer, the court held, "that the suits of satin and velvet were not necessary for an infant, although he be a gentleman; but in regard he had acknowledged satisfaction for 4*l.*, parcel, &c., and they could not tell for what that was paid, the defendant could not have judgment for any part; otherwise he should have judgment for these contracts which were allowed of." Then the question for the jury was, whether any of these articles were suitable to the infant's estate and degree. [*Parke, B.*—If *primâ facie* and abstractedly from circumstances, they were proper for his rank and station in life, that would be sufficient for the plaintiff to prove. If he was supplied aliunde, that must be proved by the defendants.] In *Ford v. Fothergill*, Lord *Kenyon* held that the question of necessities was a relative fact, to be governed by the fortune and circumstances of the infant, and that proof of those circumstances lay on the plaintiff. The plaintiff has given sufficient proof of that nature, to entitle himself to recover. This requisition as to the station and degree of the party is not a modern invention as appears by reference to the pleadings in the old entries: see *North v. Thompson* (b), and *Rainsford v. Fenwick* (c). The cases go to shew that the case of an infant is like that of an idiot, and that he is supposed to have an "invincible ignorance," which renders him incapable of contracting, except from necessity, for providing himself with food, clothing and education, &c. [Lord *Abinger, C. B.*—An infant cannot be

East. of Pleas,
1839.

BURGHART
HALL.

(a) *Ore. Eliz.* 583.

(b) *Co. Entries*, 125.

(c) *Carter*, 215.

Exch. of Pleas,
1839.

BURGHART

HALL.

liable on an account stated, and the reason given is, that he cannot calculate, and is therefore incapable of stating an account.]

Secondly, as to the effect of the allowance.—The learned Judge, in summing up the case, laid it down in the clearest way, that if the allowance was sufficient, the minor was incapable of contracting. But taking it as a proposition of law, that an infant may contract for necessities, the fact of his having an income is rather important on behalf of the plaintiff, to shew that he is considered capable of making a contract. It is laid down in Co. Litt. 172, that “an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards.” And in *Manby v. Scott* (a), it is said, “And our law allows many persons to make contracts in cases of necessity, who otherwise would be disabled from doing so; and although generally the contracts of infants are void, yet in cases of necessity their contracts shall bind them:” citing *Delavell v. Clare*, and *Pickering v. Gunning* (b). It is of necessity that an infant should be capable of going to a tailor to order clothes, and that he should not be allowed to say, when they are brought home, that he has ordered what was necessary from another tailor. It is for the advantage of the infant that he should be capable of binding himself to pay for necessities at a future day. Suppose, when a uniform proper for this gentleman’s station was brought home to him, being asked for the amount, he replied: “No, I have got money in a box, but I will not pay you till next week:”—is the tailor to take it back? Suppose on the 1st of January he is paid his half yearly allowance, and before the 20th he is robbed of it or has lost it, is that to bar the tailor from recovering? Or take the case of a schoolmaster,

(a) 2 Sid. 112.

(b) Roll’s Abr., tit. Enfants, 729.

where it is necessarily a continuing contract, as you cannot pay for each lesson: if the allowance is squandered, is he to be prevented from recovering? [*Parke, B.*—The question is to be looked at as at the time of the contract being entered into.] If the question were as to the liability of the guardian or the executor to make up the loss, the case might be very different. It is quite clear the infant could make a contract to pay ready money: and if it were not paid, the tradesman might either take the clothes away and bring an action for not taking them in, or leave them and bring an action for the amount. The rule as laid down by the learned Lord Chief Baron, would apply to articles of the most plain and homely description. But the point scarcely arises on these pleadings. The minor's having money supplied to him would not prevent the articles being necessaries at the time they were ordered. And there might have been a rejoinder that the minor had been supplied with a sufficient allowance.

Exch. of Pleas,
1839.

BURGHART
v.
HALL.

Cur. adv. vult.

In Trinity Term, 1838,

Lord ABINGER, C. B., delivered judgment.—In this case, the rule must be absolute for a new trial. I am now convinced that I laid down the rule of law too rigorously at the trial. Mr. *Erle's* able argument has satisfied me that a minor is capable by law of entering into a contract, not merely for necessaries for ready money, but into any reasonable contract for necessaries, although he may have an income. I told the jury that he could not, under such circumstances, contract but for ready money. In that direction I certainly went farther than any case has carried the rule. On this ground of misdirection, therefore, there must at all events be a new trial.

Rule absolute.

Exch. of Pleas,
1839.

CORRALL v. CATTELL.

In an action for money had and received to recover back the deposit money paid by the plaintiff on the purchase of an estate, a special case stated, that by the will of the defend-

THIS was an action of assumpsit for money had and received, brought to recover the sum of 30*l.*, which had been paid by the plaintiff to the defendant, as a deposit upon the sale of a landed estate, upon the ground that the defendant was unable to make a good title to the said estate, under the circumstances hereinafter stated.

At the trial before Lord *Abinger*, C. B., the jury found for the plaintiff, damages 30*l.*, but the learned Judge gave

ant's father, the estate in question was devised to him after the death of his mother, and to his issue in tail, subject to a payment of 2*l.* a year to his sister M. C., with remainder to the testator's own right heirs. In the year 1817, and during the lifetime of his mother, the defendant, by lease and release, assigned the estate for his own life to his sister M. C., and R. W., upon trust to receive the rents and apply them to keep the tenements in repair, to pay to M. C. her annuity of 2*l.*, and to pay the residue to the defendant. After the mother's death, M. C., (R. W. being dead,) received one quarter's rent, since which the rents had been received by the defendant. In February, 1836, the defendant advertised the estate for sale, and on the 25th of that month the plaintiff purchased it upon a contract stated in the conditions of sale. Amongst other conditions were the following:—"That the premises are to be sold subject to a yearly rent of 2*l.*, payable during the life of M. C., the sister of the defendant, and which said M. C. having given notice that in consequence of a certain alleged indenture, bearing date August 19, 1817, whereby she alleges the defendant conveyed all his estate and interest in the premises unto R. W. (now deceased), and the said M. C. for the term of his the said defendant's life, upon certain trusts in the alleged indenture contained, and that no conveyance of the premises could be made without the concurrence of her the said M. C., and who thereby declared she should refuse to execute any such conveyance, the said defendant declared that the said alleged indenture is a fabrication, and has made a solemn affidavit that he never executed any such indenture, and that such indenture, as far as concerns any supposed signature or mark of him, the defendant, is a forgery; and the opinion of Sir J. C., his Majesty's Attorney-General, and Mr. K., have been taken as to the necessity of the said M. C.'s concurring in the sale, and were in favor of the defendant's being able, by virtue of the recent act for abolishing fines and recoveries, to make a good title to the premises without the sanction and concurrence of the said M. C.; and the vendor is also prepared to prove that on the trial of an action of replevin of S. v. the said M. C., the presiding Judge expressed himself favorably to the right of the defendant to convey without the concurrence of the said M. C.; the purchaser therefore shall not make any objection on account of the said alleged indenture, nor be entitled to call for any sanction, concurrence, &c. &c., by or from the said M. C.; but if the purchaser shall think fit, in order to indemnify him or her against all action, suits, and other proceedings, claims and demands by the said M. C., a portion of the purchase-money (not exceeding 200*l.*) may remain as a charge by way of mortgage on the premises, at interest after the rent of 4½ per cent., and that such charge, at the option of the purchaser, shall remain on such security during the life of the said M. C., and for a period not exceeding twelve months after her decease." The plaintiff paid the deposit now sought to be recovered. The jury, at the trial, found a verdict for the plaintiff for the amount of the deposit, and that the deed of the 19th August, 1817, was the deed of the defendant:—*Held*, 1st, that whether the representation of the deed being a forgery were a warranty upon which the plaintiff might maintain an action or not, the plaintiff had no right to rescind the contract because it turned out to have been untrue. Secondly, that by the stipulation "that the purchaser should not make any objection on account of the alleged indenture," every species of objection to the title on the part of the purchaser arising out of the alleged deed was interdicted, and he was precluded from insisting either upon the existence of the deed, or upon its legal effect and operation, as a defect in the title which he had agreed to take.

the defendant leave to move to set aside the verdict and enter a nonsuit, upon several points made by the defendant's counsel, and upon motion accordingly in Easter Term, 1837, it was ordered that the following case should be stated for the opinion of this Court.

Book of Pleas,
1839.

CORRALA
v.
CATTELL.

Samuel Cattell, father of the defendant Thomas Cattell, died seised in fee of certain freehold houses and lands in the county of Northampton, and amongst others, of a dwelling-house in the parish of Daventry, with the appurtenances, and two closes of land with the appurtenances, called the first and middle close, which are the premises in question in the present action. Samuel Cattell died in the year 1817, having made his last will and testament, duly executed for passing of real estates, bearing date 24th April, 1817, whereby, amongst other things, he devised as follows:—"All my messuages, cottages, or tenements, and all other my freehold estates in Daventry aforesaid or elsewhere, (except the premises hereinafter devised), I give and devise to my said wife and her assigns, for and during the term of her natural life; and from and immediately after her decease, I give and devise the same in manner following; that is to say, all that my messuage or dwelling-house, with the barns, yards, and appurtenances in the parish of Daventry, now in my own occupation, and all those two closes with the appurtenances, in the late new inclosure of Daventry, afterwards called the first close and the middle close, I subject and charge unto and with the payment of one annuity or clear yearly rent-charge of 2*l.* unto my daughter Mary Cattell and her assigns, for and during the term of her natural life, by two equal half-yearly payments, the first payment to be made at the end of six calendar months next after my decease: and subject and charged as aforesaid, I give and devise the same unto my son Thomas Cattell, and the heirs of his body, and in default of such

Exch. of Pleas,
1839.

CORRALL
v.
CATTELL.

issue, I give and devise the same unto my own right heirs for ever.

The defendant is the Thomas Cattell mentioned in the will of Samuel Cattell, and is his second son: Samuel Cattell, his elder brother, and who is the right heir of the testator, is still living. The houses and two closes devised to Thomas Cattell by his father's will, form the estate the title to which is the subject of the present suit. On the 19th August, 1817, the defendant Thomas Cattell, being of the age of twenty-one years, executed the following indenture of lease and release.

This indenture, made the 19th August, 1817, between Thomas Cattell of Daventry, in the county of Northampton, carpenter, of the one part, and Richard Webb of Towcester, in the said county, brazier, and Mary Cattell of Daventry aforesaid, spinster, of the other part. Whereas Samuel Cattell, late of Daventry aforesaid, carpenter, deceased, did in and by his last will and testament in writing, bearing date the 24th April, 1817, duly signed, published, and attested in such manner as by law is required for the passing real estates, give and devise, amongst other hereditaments and premises not intended to be hereby conveyed, the messuages, closes, and hereditaments hereinafter described, unto Elizabeth Cattell, his widow, for and during the term of her natural life; and from and immediately after her decease, the said testator gave and devised the same unto him the said Thomas Cattell, party hereunto, and the heirs of his body; and in default of such issue, then unto his the said testator's own right heirs for ever: subject nevertheless and charged unto and with the payment of one clear yearly annuity or rent-charge of 2*l.* unto the said testator's daughter Mary Cattell, party hereto, and his assigns for and during the term of her natural life: and whereas the said Samuel Cattell afterwards departed this life without having revoked or altered his said will, and without having sold or otherwise dis-

posed of the said messuage, closes, and hereditaments, or any of them, except as aforesaid: and whereas the said in part recited will of the said testator Samuel Cattell, was, soon after his decease, duly proved in the Consistory Court of the Bishop of Peterborough: and whereas the said testator's widow E. Cattell is now living: and whereas the said Thomas Cattell hath applied to and requested them the said Richard Webb and Mary Cattell to take and accept of a conveyance of the estate and interest of him the said Thomas Cattell of and in the said premises, expectant on the decease of the said E. Cattell, for the term and upon the trusts and in manner, and to and for the intents and purposes hereinafter mentioned, which they have consented and agreed to do:—Now this indenture witnesseth, that in pursuance and execution of the said request and agreement, and in consideration of the sum of 10*s.* of lawful money of the United Kingdom of Great Britain and Ireland, current in Great Britain, to the said Thomas Cattell in hand well and truly paid by the said R. Webb and M. Cattell at or before the execution of these presents, the receipt whereof he the said Thomas Cattell doth hereby acknowledge, and for divers other good causes and considerations him hereunto moving: he the said Thomas Cattell hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth grant, bargain, sell, alien, release, and confirm unto the said Richard Webb and Mary Cattell, their heirs and assigns, all that the remainder or reversion expectant upon and to take effect in possession immediately from and after the decease, or other sooner determination of the life-estate of the said E. Cattell, of him the said T. Cattell, of and in all that messuage or dwelling-house, with the farm-yards and appurtenances, situate, standing, and being in the parish of Daventry aforesaid, late in the tenure or occupation of the said Samuel Cattell, deceased, and now of the said E. Cattell, his widow, and also of and

Exch. of Pleas,
1839.

CORRALL

^{v.}
CATTELL

Each. of Places,
1839.

CORRALL
v.
CATTELL.

in those two closes, with the appurtenances, in the late new inclosure of Daventry aforesaid, called the first close and middle close, late also in the tenure and occupation of the said Samuel Cattell, deceased, and now of ———, together with all and singular houses, &c., all which said messuage or dwelling-house, with the appurtenances so in remainder or reversion, expectant as aforesaid, are now fully and legally vested in them the said R. Webb and Mary Cattell, by virtue of a bargain and sale to them thereof made for one whole year, in consideration of five shillings, by indenture bearing date the day next before the day of the date of these presents, commencing from the day next before the day of the date thereof, and executed before these presents, and by force and virtue of the statute made for transferring uses into possession, and also of and in the rents, issues, profits, and proceeds to arise and become payable for or in respect of the same hereditaments and premises, or any part thereof: to have and to hold the remainder or reversion, expectant as aforesaid, of and in the said messuage or dwelling-house, closes, hereditaments, and premises so hereby granted and released, or mentioned or intended so to be, with all and every the rights, members and appurtenances, to the same belonging, unto and to the use of them the said R. Webb and Mary Cattell, their heirs and assigns, for and during the natural life of the said Thomas Cattell, upon the trusts nevertheless, and to and for the ends, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same, viz., upon trust that they the said Richard Webb and Mary Cattell, their heirs and assigns, do and shall, as soon as conveniently may be after the determination of the life-estate of the said E. Cattell of and in the said hereditaments and premises, on his, her, or their own proper authority, and without the concurrence or further power of him the said T. Cattell, let out and demise the said

messuage or dwelling-house, close, hereditaments, and premises, either together or separately, from year to year, or for any term not exceeding the natural life of him the said T. Cattell, to responsible tenants, for the best rent that can be obtained for the same, and upon trust to receive the rents and profits thereof yearly and every year as they shall become due and payable, during the natural life of the said Thomas Cattell, and thereout in the first place to pay and discharge the said annuity, or clear yearly rent-charge of 2*l*., charged upon the hereditaments and premises in and by the said in part recited will of the said Samuel Cattell, and also to pay and discharge all the bills to be incurred in repairing and keeping the said hereditaments and premises in good tenantable repair; and, after payment thereof, to retain and reimburse to themselves respectively all costs, charges, and expenses, which they, or either of them, shall or may incur, sustain, or be put unto in or about the execution of the trusts hereby in them reposed; and upon further trust, after the payments aforesaid, to pay the whole of the said residue of the said rents and profits unto him the said Thomas Cattell, his executors, administrators, or assigns. And it is hereby expressly declared and agreed by and between the said parties to these presents, that the estate and interest of them the said R. Webb and Mary Cattell, of and in the said hereditaments and premises, shall not extend, nor shall any thing herein-contained be construed to extend, to any further period than during the natural life of the said T. Cattell, and that the same, and the trusts of the present deed, shall immediately upon the decease of the said Thomas Cattell cease, determine, and be absolutely void to all intents and purposes whatsoever.

Esch. of Pleas,
1839.

CORRALE
v.
CATTELL.

This deed purported to be executed by Thomas Cattell, Richard Webb, and Mary Cattell. No evidence was given on either side as to the consideration of the

Exch. of Pleas,
1839.

—
CORRALL
v.
CATTELL.

deed. Mary Cattell is the defendant's sister, the same who is mentioned in the will of Samuel Cattell. E. Cattell, the widow of Samuel Cattell, received the rents and profits of this estate until her death in 1832. Since her death, both Mary Cattell and the defendant have claimed to receive them. Mary Cattell actually received the first quarter's rent, and accounted for it to the defendant, after deducting what was due in respect of her annuity; since that the tenant has paid to the defendant. In the month of February 1836, the defendant advertised the premises in question to be sold by public auction. On the day of the sale, and before it took place, the plaintiff agreed to purchase them by private contract; and on the 25th February, 1836, an agreement in writing was signed by the plaintiff and defendant, of which the following is a copy:—

“ Freehold Farm and Premises at Daventry.

“ To be sold by auction, by Mr. Dennis, on Thursday the 25th of February next, at 5 o'clock in the afternoon, at the Goat Inn, Northampton, (unless previously disposed of by private contract), subject to such conditions as will be then produced, all those two closes of freehold arable and pasture land, containing by admeasurement 8 acres, a little more or less, together with the house, barn, shed, and other out-buildings, all brick-built and tiled, in good repair, and now let to respectable yearly tenants. It is subject to a rent-charge of 2*l.* per annum, payable half-yearly to a female now about 65 years of age. The above property is most eligibly situated for investment, on the Newnham Road, in the parish of Daventry, and is only 350 yards from the Holyhead road, and about three-quarters of a mile from Daventry, and is well supplied with water. A portion of the purchase money may remain on security of the estate, if desired by the purchaser. For further particulars apply (if by letter post paid) to Mr. W.

Buston, Saracens-Head Inn, Daventry, and to Mr. Henry Becke, solicitor, Northampton.

Esch. of Pleas,
1839.

CORRALL
v.
CATTELL.

“ That the purchaser shall at his or her own expense, upon payment of the remainder of the purchase money as hereinafter mentioned, have a proper conveyance and assurance; but if the completion of the purchase shall be delayed beyond the time above fixed for the completion thereof, the vendor shall be entitled to interest upon the purchase money remaining unpaid, after the rate of 4*l.* per cent. per annum, from that time to the day when such money shall be actually paid. That the premises to be sold having been taken in exchange by Samuel Cattell, deceased, the father of the vendor, under an award made pursuant to an act of Parliament, 42 Geo. 3, for dividing and inclosing the open and common fields of Daventry, and which award bears date the 30th of April, 1838, the abstract of title will commence with an extract from the award, and the purchaser shall not be at liberty to require any earlier title to be shewn, either to the premises to be sold, or the property in respect of which they were awarded, or for the allotments for which they were taken in exchange, or the property in respect of which those allotments were awarded, nor make any objection on account of such exchange, nor require any copy of the said act to be produced, or any evidence of the award having been made pursuant thereto. That the premises are to be sold subject to a yearly rent or annual sum of 2*l.*, payable during the life of Mary Cattell, the sister of Thomas Cattell the vendor; and which said Mary Cattell having given notice, that in consequence of a certain alleged indenture bearing date August 19th, 1817, whereby she alleges the said Thomas Cattell conveyed all his estate and interest in the premises now offered for sale unto one Richard Webb (now deceased), and the said Mary Cattell, for the term of his the said Thomas Cattell's natural life, upon certain trusts in the said alleged indenture contained,

Such of Pleas,
1839.

CONNELL

v.
CATTILL.

and that no conveyance of the above premises could be made without the concurrence of her the said Mary Cattell, and who thereby declared she should refuse to execute any such conveyance, the said Thomas Cattell declared that the said alleged indenture is a fabrication, and has made his solemn affidavit that he never executed any such indenture, and that such indenture as far as concerns any supposed signature, or mark of the said Thomas Cattell is a forgery; and the opinion of Sir John Campbell, his Majesty's Attorney-General, and Mr. Koe, of the Chancery Bar, have been taken as to the necessity of the said Mary Cattell concurring in the sale, and the opinions of both, copies of which will be produced at the sale, were in favour of the said Thomas Cattell being able, by virtue of the provisions of the recent statute for abolishing fines and recoveries, to make a good title to the said premises without the sanction and concurrence of the said M. Cattell, and the vendor is also prepared to prove, that on the trial of a certain action of replevin in *Such v. the said Mary Cattell and another*, at the last Northamptonshire Summer Assizes, the presiding Judge, Mr. Justice Vaughan, expressed himself favourably to the right of the said Thomas Cattell to convey without the concurrence of the said Mary Cattell; the purchaser, therefore, shall not make any objection on account of the said alleged indenture, nor be entitled to call for any sanction, concurrence, release or other assurance, act or deed whatever, by or from the said Mary Cattell; but if the purchaser shall think fit, in order to indemnify him or her against all actions, suits, and other proceedings, claims, and demands by the said Mary Cattell, a portion of the purchase-money (not exceeding the sum of 200*l.*) may remain as a charge by way of mortgage on the premises, at interest after the rate of 4½ per cent. per annum, payable to the said Thomas Cattell, his executors, administrators, or assigns, and that such charges, at the option of the purchaser, shall

remain on such security during the life of the said Mary Cattell, and for a period not exceeding 12 months after her decease, but the purchaser is to be at liberty at any time, by giving 6 months notice in writing to the said Thomas Cattell, his executors, administrators, or assigns, to pay off the said mortgage.

Esch. of Pleas,
1839.

CORRALL
vs.
CATTELL.

“That all conveyances, surrenders, and other assurances which may be required by the purchaser, shall be prepared by and at the expense of the purchaser. That if any error or mis-statement shall be discovered in the quantities or the description of the property to be sold, or in the out-goings thereof, the same shall not vitiate the sale, but a reasonable compensation shall be taken or given, as the case may require. That if the purchaser shall fail or neglect to comply with the above condition, the deposit-money of such purchaser shall thereupon become forfeited to the vendor, who shall thereafter be at full liberty, with or without notice, to re-sell the premises by public auction or private contract, and if, on such re-sale, there should be any deficiency, the purchaser so failing or neglecting as aforesaid shall make good such deficiency to the vendor, and all expenses attending such re-sale, and it shall not be necessary previously to tender a conveyance to such purchaser. But in case the purchaser at the present sale shall be dissatisfied with the title deduced to the premises, or shall require any evidence not in the vendor's possession, the vendor will be at liberty, if he think fit, to rescind the contract of such purchaser, and to return to him or her his or her deposit-money, without interest, and his or her moiety of the auction duty, in full satisfaction of all claims and demands whatsoever.

“Memorandum—We, the undersigned, do hereby agree as follows: that the undersigned Christopher Corrall shall be the purchaser of the within mentioned farm and pre-

Exch. of Pleas,
1839.

CORRALL
v.
CATTELL.

mises, at or for the price or sum of 490*l.*, on the stipulations and conditions above specified, and the undersigned Thomas Cattell shall and will sell to the said C. Corral the said farm and premises, at the sum of 490*l.*, on the stipulations and condition within specified—30*l.* to be paid down in part of the purchase-money, and the purchase to be completed on the 6th of April next, all outgoings to that day to be cleared by the vendor: all other stipulations between the parties as above particularly specified, save and except the first, second, and third conditions, which are hereby agreed to be struck out, and also the memorandum following the tenth condition. Dated this 25th February, 1836.

“CHRISTOPHER CORRALL.
THOMAS CATTELL.”

In pursuance of this agreement, the 30*l.* sought to be recovered in this action was paid by the plaintiff to the defendant, as a deposit in part payment of the purchase-money. The jury found on the trial a verdict for the plaintiff for 30*l.*, and found that the deed of the 19th of August, 1817, was the deed of the defendant Thomas Cattell.

The question for the Court is, whether, under the above circumstances, the plaintiff is entitled to recover his deposit of 30*l.* If so, then the verdict for the plaintiff is to stand; if not, then a nonsuit to be entered.

The points stated for argument on the part of the plaintiff were as follows:—

The questions for the opinion of the Court are, first, whether the defendant, without the concurrence of Mary Cattell, can make a good title to the plaintiff.

Secondly, whether, after having represented to the plaintiff that the deed of the date of August, 1817, was a forgery, the defendant can compel the plaintiff, who pur-

chased under the faith of that representation, to accept the title, the jury having found that the deed was a valid one, and executed by the defendant.

Esch. of Pleas,
1839.

CORRALL

vs.

CATTELL.

The points to be argued on behalf of the defendant were—first, that the plaintiff is precluded by his agreement from making any objection to the defendant's title to the estate in question, founded upon the indenture of the 19th of August, 1817, or upon the refusal of Mary Cattell to join in the conveyance to him.

Secondly, that, considering the plaintiff not to be precluded, the defendant can make a good title to the estate in question, having full power to dispose of it in fee simple, under the provisions of the statute 3 & 4 Will. 4, c. 74, the act for the abolition of fines and recoveries, without the concurrence of Mary Cattell.

Thirdly, that no objection to the defendant's title can arise from the conveyance to M. Cattell, it being voluntary and without consideration, and consequently void against a purchaser, even with notice of it, under the statute 27th Eliz. c. 4.

The case was argued in Michaelmas Term last, by *Hodgson* for the plaintiff, and *Waddington* for the defendant; but as the points taken on the argument are fully adverted to in the judgment, and as upon some of them no opinion has been given, it has not been thought necessary to state the arguments at length.

The judgment of the Court was delivered in this term by

Lord ABINGER, C. B.—This was a special case upon an action for money had and received, to recover 30*l.*, the deposit paid by the plaintiff upon a contract to purchase an estate from the defendant. The case states, that by the

Esch. of Pleas
1889,

GOBBALL

^{vs.}
CATTALL,

will of the defendant's father, the estate in question was devised to him after the decease of his mother, and to his issue in tail, subject to a payment of 2*l.* a-year to his sister, M. Cattell. During the life of the mother, the defendant, by a conveyance duly made, assigned the estate for his own life to his sister, Mary Cattell, and R. Webb, upon trust to receive the rents and apply them to keep the tenements in repair, to pay to Mary Cattell an annuity of 2*l.*, and to pay the residue to the defendant after his mother's death. Mary Cattell (Webb being dead), received the rents for a short time, since which they have been received by the defendant. In the month of February, 1886, the defendant advertised the estate for sale, and, on the 25th of the same month, the plaintiff purchased it upon the following contract. [The learned Judge here stated the contract.] The plaintiff paid the deposit of 30*l.* now sought to be recovered, and the question is, whether upon the objections he has urged, the money ought to be returned.

In the first place, he contends that the agreement contained a *warranty* that the deed of conveyance to Mary Cattell was a forgery : and that the jury having found the deed to be genuine, he was entitled to rescind the contract, and to recover back the deposit ; and in the second place, he insists that, the deed being genuine, the defendants could not make the title which he stipulated by the agreement to make, and therefore the plaintiff was equally entitled to recover.

Upon the first question, we think that whether the representation of the deed being a forgery be a *warranty*, upon which the plaintiff may maintain an action, or not, the plaintiff has no right to rescind the contract, because it turns out to be untrue. For we think that, looking at the whole of the contract, and especially at the provision for the contingency of the deed being genuine, it was the

intention of the parties, that the vendor is to take the estate, whether the deed were genuine or not, retaining part of the purchase-money on mortgage as an indemnity. Though the deed be genuine, the defendant stipulates that he will not make the existence of it any ground of objection to the title. Therefore, if the defendants could make a title supposing that deed not to exist, the plaintiff is bound to accept it.

Exch. of Pleas.
1839.

CORRALL
v.
CATTELL.

The warranty, therefore (if it be one), does not go to the whole of the consideration for the payment of the deposit, and the breach of it does not give the plaintiff a right to recover as upon a total failure of consideration, but a right of action only for the amount of the damages actually sustained thereby.

The next question is, whether the plaintiff is entitled to a verdict on the second ground insisted upon in argument, viz., that the deed being genuine, the defendant was not able to make that title which he stipulated for by the agreement. Upon this it has been very ingeniously argued, that the defendant having parted with his life-estate altogether, or at least parted with the legal interest, was not in a condition to have suffered a recovery to bar the reversion, upon his estate-tail to his elder brother, who is alive, and that the statute for abolishing fines and recoveries will not help him out of the difficulty, either because Mary Cattell is a protector of the settlement, within the meaning of that act, who will not join, or because there is no protector of the settlement, and therefore the act does not apply.

But we are of opinion that it is not necessary to decide these nice questions; because the agreement, after stating the opinions of the Attorney-General and Mr. Koe, and an intimation of an opinion of Mr. Justice Vaughan, that under the statute for the abolition of fines and recoveries, a good title could be made without the con-

Exch. of Pleas,
1839.

CORRALL

v.
CATTELL.

currence of M. Cattell, provides, "that the purchaser shall not make *any objection* on account of the alleged indenture:" we think that, according to the ordinary signification of these words, *every species of objection* to the title, on the part of the purchaser, arising out of the alleged deed, is interdicted, and he is therefore precluded from insisting, either upon the existence of the deed, or upon its legal effect and operation, as a defect in the title which he has agreed to take ;—and this interpretation is perfectly consistent with every other part of the agreement, and is by no means unreasonable. The plaintiff may have been imprudent in entering into a contract whereby he may be forced to take a defective title: but he has himself only to blame, for he either knew of the supposed defect, or had the means of knowing it if he had chosen to use them, by perusing the cases submitted for the opinion of the learned counsel above referred to.

If we adopt this, which we think the true construction of the contract, the defendant has made out such a title as he agreed to do, for he clearly had the power of conveying in fee under the statute for the abolition of fines and recoveries, if it had not been for the previous conveyance to Mary Cattell: and the existence and effect of that conveyance were the only objections to a title in fee simple, and these objections the plaintiff has waived. The plaintiff, therefore, cannot recover back the deposit, on the ground that the defendant could not make the title which he stipulated to make.

Judgment for the defendant.

VACATION SITTINGS AFTER HILARY TERM (a).

PALMER v. THE GRAND JUNCTION RAILWAY COMPANY.

CASE.—The declaration stated that the defendants, before and at the time of the committing of the grievances by the defendants thereafter mentioned, *were the owners and proprietors of a certain railway, to wit, &c. &c., and of certain engines and carriages* used by them for the carriage and conveyance therein and thereon, of passengers, cattle, goods and chattels, in, upon, and along the said railway, from a certain place, to wit, Liverpool to a certain other place, to wit, Birmingham, and from Birmingham to Liverpool, *for hire and reward* to them the defendants in that behalf; *and being such owners and proprietors* of the said railway, and the said engines and carriages, for the purpose aforesaid, the plaintiff heretofore, and before the commencing of the said grievances, and before the commencement of this suit, to wit, on, &c., caused to be delivered to the said defendants, and the said defendants then received from the plaintiff, divers, to wit,

By the statute 3 Will. 4, c. 34, (local and personal, public), the Grand Junction Railway Company are empowered to make a railway from Warrington to Birmingham, by section 154 they are empowered to receive certain tonnage rates "for all articles, matters, or things carried or conveyed on the railway;" by section 156 the Company are empowered to become carriers themselves, and are authorized, if they shall

think proper to use engines, &c., to carry and convey upon the railway all such passengers, cattle, goods, wares, and merchandise, articles, matters, and things as shall be offered to them for that purpose, upon certain reasonable charges;" by the 214th section, "no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person *for any thing done or omitted to be done in pursuance of the act*, or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under the act, unless fourteen days' previous notice in writing shall be given by the parties intending to commence or prosecute such action, &c., nor unless such action, &c. shall be brought within three months;" and by the 215th section, power to tender amends is given. Under the 156th section, the Company became carriers themselves. In an action against the Company (alleging them to be owners and proprietors of the railway) for not safely carrying and conveying some horses in their carriages on the railway, whereby one was killed and others were injured:—*Held*, that the Company were not entitled to notice of action, as for a thing done or omitted to be done in pursuance of the act; and that, not having restricted their liability by any special contract, they were subject to the liabilities of carriers at common law.

At the trial, there was contradictory evidence as to whether a ticket, by which the Company sought to limit their liability, had been delivered to the son of the plaintiff, and the learned Judge left it to the jury to say whether it was delivered to him or not:—*Held*, that it was no misdirection in not directing them to find whether it was read over and explained to him.

(a) Under the authority of the stat. 1 & 2 Vict. c. 32.

Exch. of Pleas,
1889.

Palmer
v.
THE GRAND
JUNCTION
RAILWAY CO.

nine horses of the plaintiff, of great value, to wit, of the value of 500*l.*, *to be safely and securely carried and conveyed by the defendants*, in and upon the said carriages, on and by the said railway, from Liverpool aforesaid to Birmingham aforesaid, *and there*, to wit, at Birmingham aforesaid, *to be safely and securely delivered for the plaintiff*, for certain reasonable reward to the defendants in that behalf, and thereupon it became and was the duty of the defendants *safely and securely to carry and convey and deliver* for the plaintiff at Birmingham aforesaid, the said horses of the plaintiff. Breach, that the defendants, not regarding their duty in that behalf, *did not use due or proper care in and about the carriage and conveyance* of the said horses of the plaintiff from Liverpool aforesaid to Birmingham aforesaid, but took so little and such bad care *in and about the carrying and conveying the said horses* of the plaintiff, and *in conducting, managing, and directing their* the defendant's said carriages in and upon and along the said railway, that the carriages which contained the said horses of the plaintiff, were then thrown and cast with great force and violence off and from the said railway, and over and down a certain embankment and bank down to and upon the ground, and then were crushed and broken to pieces, and thereby one of the horses of the said plaintiff, of great value, to wit, &c. was then killed, and the residue of the said horses of the plaintiff, of great value, to wit, &c. were then greatly bruised, lacerated, cut, strained, and injured, and deteriorated in value, and rendered and became wholly useless to the plaintiff. The declaration then alleged damage which the plaintiff had sustained by the clothing and harness attached to the horses being torn and damaged, and the expense of medicine and attendance provided for the horses, and of the loss of gains and profits which otherwise would have been obtained for the use of the horses.

Pleas, 1st, not guilty; 2ndly, that the defendants did not receive from the plaintiff the said horses, or any of them, *to be safely and securely carried and conveyed by the defendants* in and upon the said carriages, on and by the said railway, from Liverpool aforesaid to Birmingham aforesaid, and then, to wit, at Birmingham aforesaid, *to be safely and securely delivered for the plaintiff*, in manner and form as the plaintiff hath in his declaration in that behalf alleged; upon which pleas issues were joined.

Book of Pleas,
1839.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

At the trial before *Tindal*, C. J., at the last Summer Assizes for the country of Warwick, it appeared that the plaintiff was a horse-dealer at Northampton, and upon the 13th of February, having some horses at Liverpool, he applied at the booking-office of the defendants there, who were carriers upon the line, and also the owners and proprietors of the Grand Junction Railway, and were incorporated by an act of 3 Will. 4, c. 34, (local and personal), to have some horses carried by their railway to Birmingham. Nine horses were accordingly booked, and 10*l.* 10*s.* paid for their carriage, to go by a train from Liverpool at half-past four in the afternoon; at which time they left, with the plaintiff's son in attendance upon them, the horses having been placed in three horse-boxes, being a kind of caravan constructed for the purpose on four wheels and adapted to the railway. The train proceeded safely until within a few miles of Birmingham, when, as it was proceeding at about the usual rate, the engine was suddenly thrown off the rails, in consequence of coming in contact with a horse, which had strayed from an adjoining field, and lain down upon the railway. The engine, tender, and horse-boxes, were thrown off the rails, and running down the embankment into the adjoining field, were instantly overturned. One of the horses was killed upon the spot, and the rest more or less injured. It appeared that some labourers in the employ of the Company had been working at a culvert or drain, and

Exch. of Pleas,
1839.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

had taken down some part of the fence which separated the field from which the horse had strayed from the railroad, and it was alleged that they had omitted to make good the fence when they discontinued working. There was contradictory evidence as to whether the following ticket had been delivered to the plaintiff's son at the time when the horses were booked in Liverpool:—

“ Ticket for horses and carriages.

“ From Liverpool to Birmingham—4½ o’Clock Train—
February 13, 1838. PALMER.

“ Nine horses to Birmingham—Carriage, 10*l.* 10*s.*

“ Paid, E. C.

“ This ticket is issued *subject to the owners undertaking all risks of conveyance whatsoever*, as the Company will not be responsible for any injury or damage (however caused) occurring to horses or carriages travelling upon the Grand Junction Line.”

The plaintiff, in an early part of his case, tendered evidence to shew that the fences of the field in which the horse was kept which had occasioned the accident, were in an insufficient state. This evidence was objected to, upon the form of the declaration, but admitted,—upon a reservation of the point, as the defendants contended,—but on reading the report it did not appear that at the close of the plaintiff's case any further objection was made that the evidence did not support the declaration, or that any leave had been given to move for a nonsuit upon this ground. The defendants further contended, that by the 214th section of the act, fourteen days' notice of action ought to have been given. The learned Judge overruled the objection, but gave leave to move to enter a nonsuit on this point. Two questions of fact were left to the jury; 1st, whether the accident was occasioned *by gross negligence* of the defendants; and 2ndly, whether the above ticket, by

which the Company sought to limit their responsibility, ever came into the possession of the plaintiff's son, or any other person acting for the plaintiff. The jury found gross negligence in the defendants, and that no ticket had been given, and returned a verdict for the plaintiff, with 150% damages.

Exch. of Pleas,
1839.

PALMER
v.
**THE GRAND
JUNCTION
RAILWAY CO.**

In Michaelmas Term, *Hill* obtained a rule nisi for a non-suit, on two grounds; 1st, that the declaration being against the defendants *as carriers*, it was not supported by evidence which fixed them with negligence in the non-repair of fences, in their character of *railway proprietors*; and 2ndly, that fourteen days' notice in writing had not been given to the defendants before bringing this action. He also obtained a rule for a new trial on the ground of misdirection on the part of the learned Judge, in leaving it to the jury to consider whether the ticket ever came *into the possession* of the plaintiff's agent, instead of leaving to them whether it was not read over or its contents communicated to him.

The following sections of the act were adverted to in the argument:—

Section 154 enacts, "That it shall be lawful for the Company to demand, receive, and recover, to and for the use and benefit of the said Company, for the tonnage of all articles, matters, and things which shall be carried or conveyed upon or along the said railway, or any part thereof, any rates or tolls not exceeding the following, viz." [setting them forth].

Section 155 enacts, "That it shall be lawful for the said Company to demand, receive, and recover, to and for the use and benefit of the said Company, for and in respect of passengers, beasts, cattle, and animals conveyed in carriages upon the said railway, any tolls not exceeding the following, viz." [setting them forth].

Each. of Pleas,
1889.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

Section 156 enacts, "That it shall be lawful for the said Company, and they are hereby authorized, (if they shall think proper to use and employ locomotive and other engines, or other moving power, and in carriages and waggons drawn or propelled thereby, *to carry and convey upon the said railway*, all such passengers, cattle, goods, wares, and merchandise, articles, matters, and things as shall be offered to them for that purpose, and to make such reasonable charges for such carriage and conveyance as they may from time to time determine upon, in addition to the several tonnages and tolls hereinbefore authorized to be charged and received; provided, that neither the said Company, nor any other person or persons using the said railway as carriers, shall ask, demand, or be entitled to take (both for tolls and carriage) any greater sums than the following, that is to say," &c.

Section 180 enacts, "That the said Company shall, at their own expence, so soon as the said railway shall have been laid out and formed, *forthwith make and erect*, and from time to time maintain, such and so many convenient gates in, upon, or adjoining the said railway, and such and so many bridges, arches, hollows, culverts, *fences*, ditches, drains, and passages over, under, or by the side of, or leading to or from the said railway, of such dimensions and in such manner as two or more justices of the peace for the counties of Lancaster, Chester, Stafford, or Warwick, within their respective jurisdictions, shall, upon the application of the owner, lessee, or tenant of any lands, mines, or minerals, judge necessary and appoint, (in case there shall be any dispute about the same), *for the use of the owners and occupiers of the respective lands*, mines, and minerals through or over which such railway shall be made, and for the commodious use and occupation of their lands, &c., on either side of the said railway, or for protecting the said lands, &c. from trespass, or the cattle, or other property of the owners or occupiers thereof, from

straying or escaping thereout by reason of such railway, or any matter or thing to be done in pursuance of this act; and all such gates, &c., so to be made as aforesaid, shall from time to time and at all times thereafter be maintained in sufficient repair and condition by the said Company," &c.

Each of Pleas,
1859.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

Section 182 enacts, "That the said Company shall and they are hereby required, at their own expence, after any land shall have been taken for the use of the said railway and other works, to separate the same and to keep the same constantly separated from the lands adjoining to such railway and other works, with good and sufficient posts, rails, hedges, ditches, mounds, *or other fences*, in case the owners of such land adjoining to such railway or other works, or any of them respectively, shall at any time desire the same to be fenced off, or in case the said Company shall think proper so to fence off the same (instead of erecting gates across the same), and shall make and maintain all necessary gates and stiles in all such fences to be made as aforesaid."

Section 214 enacts, "That no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person *for any thing done or omitted to be done in pursuance of this act, or in the execution of the powers and authorities, or any of the orders made, given, or directed in, by, or under this act, unless fourteen days' previous notice in writing shall be given by the party or parties intending to commence and prosecute such action, suit, or other proceeding, to the intended defendant or defendants, nor unless such action, &c., shall be brought or commenced within three calendar months next after the fact committed, (or in case there shall be a continuation of damage, then within three calendar months next after the doing or committing such damage shall have ceased), nor unless such action, &c., shall be laid and brought in the*

Exch. of Pleas,
1839.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

county or place where the matter in dispute or cause of action shall arise; and the defendant or defendants in such action, &c., may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon, *and that the acts were done, or omitted to be done, in pursuance of or by the authority of this act*; and if it shall so appear, or if it shall appear that such action, &c., hath been brought otherwise than as hereinbefore directed, then and in every such case the jury shall find for the defendant or defendants."

The 215th section provides, "that no plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this act, or under or by virtue of any power or authority hereby given, *if tender of sufficient amends shall have been made by or on behalf of the party or parties* who shall have committed such irregularity, trespass, or other wrongful proceeding, before such action brought;" and it then goes on further to provide, in case no such tender shall have been made, that it shall be lawful for the defendant, by leave of the Court, at any time before issue joined, to pay money into Court.

Humfrey and Wadlington now shewed cause.—First, there was no misdirection as to the delivery of the ticket for the horses. The evidence on the part of the plaintiff was, that no ticket had ever been received at all, and that if it had been given to any one, it was to a stranger: the evidence of the defendants contradicted that, and their witnesses proved a delivery of it to the plaintiff's son, and its subsequent receipt from him. The evidence was left to the jury, and they believed the plaintiff's witnesses. That was a question of fact peculiarly for the jury, and they have decided it, it having been fully left to them.—Secondly, no objection was taken at the end of the plaintiff's case, that the evidence shewed negligence on the part of the Company

in their character of *railway owners*, in not keeping the fences in repair, and that such evidence did not support the allegations in the declaration, charging them with negligence as common carriers, for not safely carrying and delivering the horses. No leave to enter a nonsuit was given on any such objection, and if such an objection had been made, the plaintiff would have applied to have the record amended. With respect to the more important question, whether a notice of action ought to have been given, it will be necessary to call attention to the pleadings, and the issues raised thereon, in order to see whether the act of Parliament is applicable to this case. The declaration does undoubtedly contain averments that the defendants are proprietors of the railway, but in truth it is an action against them as common carriers, upon their common law liability safely to carry and convey. The first plea is not guilty, which merely puts in issue the injury of the horses. The second plea is, that the defendants did not receive the horses to be safely and securely carried and conveyed by them in and upon the said carriages, on and by the said railway from Liverpool to Birmingham, there to be safely and securely delivered for the plaintiff, modo et formâ. This plea shews that the defendants intended to set up as a defence some contract by which their general liability was qualified, as by means of some ticket or notice; and the plaintiff therefore gave evidence of gross negligence, for which they would be still chargeable, in order to meet the plea, although they should prove under it a limited liability. But the jury having found that no ticket was ever delivered, have negatived the contract set up by the plea, and the defendants' ordinary liability as carriers remains, under which the not having safely delivered the horses is a breach of duty. [*Parke, B.*—The declaration is not in the usual form of a declaration against carriers.] It does not differ from the

Esch. of Pleas,
1839.

PALMER

THE GRAND
JUNCTION
RAILWAY CO.

Decl. of Pleas,
1839.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

common form, except that it contains an averment that the defendants were proprietors of the railway. The question of negligence must be thrown out of the case, as the jury have found gross negligence, and that there was no special contract. [*Parke, B.*—Does the rule as to negligence apply to live animals, as men or horses? Of course, where they are stolen, it would; but is it so where they are delivered, although hurt or damaged? If misdelivered, the carriers would be liable: but they would not be liable for a mere accident to a live animal, supposing the carriage to be safe and good, and properly conducted.] There is a distinction as to passengers, because they contract for themselves, but that does not apply to goods (a.) The plaintiff has not tied himself down by stating the particular act of negligence, but the allegation is general, which is sufficient; 2 Stark. Evid. 202. There is nothing in the declaration charging the defendants *with any act as railway proprietors*: it states them to be proprietors of the railway, but does not charge them with any act as such. The plaintiff is not therefore precluded from treating the defendants as common carriers. Then, the act of Parliament contains no provision to restrict or qualify the liability of the Company as carriers: it merely enables them (by section 156) to carry if they choose, and to make certain reasonable charges for carrying, in addition to their tolls. The legislature having made no provision as to their liability as carriers, they must be left to their common law liability. But if the negligence consisted in not keeping up the fences, that is a duty imposed by common law, and not under this act of Parliament, and therefore notice was not necessary. The 214th section enacts, that no action &c. shall be brought “*for any thing done or omitted to be done in pursuance of this act, or in the execution of the powers or*

(a) *Stewart v. Crawley*, 2 Stark. N. P. C. 323, was the case of a dog.

authorities, or any of the orders made, given or directed, in, by or under this act," unless 14 days notice shall be given; and the defendant or defendants in such action may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon, "and that *the acts were done, or omitted to be done*, in pursuance of or by the authority of this act."

[*Parke, B.*—Do the Company undertake with the persons whom they carry, to keep the road clear?] It is submitted that they do: *Parnaby v. The Lancaster Canal Company (a)*. No notice was necessary, as this was not "an act done or omitted to be done" in pursuance of the act, within the meaning of the 214th section. The acts done, intended by that section, are acts beneficial to the Company, as excavating, digging, making orders, &c., and the acts omitted to be done, are duties of a burdensome nature imposed by the act, such as fencing off the railway from lands adjoining to it, when required so to do by the owners, which is a burthen imposed upon them by the 182nd section. In *Smith v. Shaw (b)*, *Bayley, J.*, in delivering the judgment of the Court, says,—"According to the decisions upon similar words, a thing is to be considered as done *in pursuance of the act*, when the person who does it is acting honestly and bonâ fide, either under the powers which the act gives, or in discharge of the duties which it imposes." Now, how can that principle extend to this matter, in respect of which the act makes no provision, but it is left to the rules of the common law? By the 154th section, the Company are allowed to demand and receive tolls in respect of all goods conveyed upon the railroad; by the 155th, they are empowered to receive tolls in respect of all passengers conveyed in carriages put upon the railway, and used

Book of Pleas,
1839.

PALMER

v.
THE GRAND
JUNCTION
RAILWAY CO.

(a) 3 Nev. & Per. 523. (b) 10 B. & C. 284; 5 Man. & R. 231.

Exch. of Pleas,
1839.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

for that purpose by *other persons* than the Company. Then, by the 156th section, the Company are allowed, if they choose, to become carriers themselves, and they are there designated as “carriers,” as well as other persons using the railway as such. When the Company, therefore, in exercise of the permission given them by the act, become *carriers* on the railway, then what they do in that character is in no way in pursuance of any power given them by the act, but is subject to the liabilities and duties which the common law imposes upon them as carriers. If, therefore, at common law, they would be liable for a mere non-delivery, the plaintiff ought not to be nonsuited, because he has gone further, and shewn gross negligence: and this action being, in substance, for a breach of duty as common carriers, no notice in writing was necessary. The case of *Sellick v. Smith* (a) may be relied upon on the other side, but that decision was merely on motion for a new trial, without consideration, and has been much doubted. *Bayley, J.*, in *Smith v. Shaw* (b), says,—“In deciding this case, it is not necessary to go the length of *Sellick v. Smith*, which was cited at the bar, nor to say whether a mere nonfeasance would be *an act done* within this and similar statutes.” Besides, that case is very distinguishable from the present.—They referred also to *Wallace v. Smith* (c), *Gaby v. The Wilts and Berks Canal Company* (d), *Edge v. Parker* (e), *Carruthers v. Payne* (f), *Waterhouse v. Keen* (g), *Cook v. Clark* (h), *Butler v. Ford* (i), *Fletcher v. Greenwell* (k),

(a) 11 Moore, 459 ; 3 Bing. 603.

(b) 10 B. & C. 287 ; 5 Man. & R. 234.

(c) 5 East, 114.

(d) 3 M. & Sel. 580.

(e) 8 B. & Cr. 697 ; 3 Man. & R. 365.

(f) 5 Bing. 270 ; 2 M. & P. 429.

(g) 4 B. & Cr. 200 ; 6 D. & R. 257.

(h) 10 Bing. 19 ; 3 M. & Scott, 371.

(i) 1 Cr. & M. 662.

(k) 1 Cr. M. & R. 754.

Cane v. Chapman (a), *Wedge v. Berkeley* (b):—and distinguished those cases where notice had been held requisite, as being cases where the act done was in pursuance of the particular act of Parliament.—Suppose the Company converted or sold the goods, or delivered them to another person, it could never be said that they were entitled to notice. By the 215th section, the Company are allowed to tender amends in any action for any irregularity committed in the execution of that act, or *by virtue of any power or authority thereby given*: but would the Company be entitled to tender amends, in consequence of a breach of their duty as carriers? Clearly not. The clause as to notice must be read in conjunction with this clause, and they must have the same construction. Notice can only be necessary in actions brought for the doing or omitting to do some specific acts prohibited or required by the act to be done, and cannot be extended to transactions arising out of the defendants' trade as carriers: and, in substance, this action is against them in that capacity.

Exch. of Pleas,
1839.

PALMER

THE GRAND
JUNCTION
RAILWAY CO.

Hill and *W. T. S. Daniel*, contra.—The learned Judge misdirected the jury, in leaving to them the question whether the ticket was delivered or not, instead of leaving it to them whether it was read over and explained or not. That was a very material question, upon the point whether the special contract contained in it was entered into or not. But, secondly, the real cause of complaint against the defendants was the defect of fences, in consequence of which this accident occurred. That neglect was an act "omitted to be done in pursuance of the act," and notice of action ought therefore to have been given. By section 180, it is enacted that the Company shall, at their own

(a) 5 Ad. & Ell. 647; 1 Nev. & P.
104.

(b) 6 Ad. & Ell. 663.; 1 Nev. &
P. 665.

Exch. of Pleas,
1889.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

expense, make and erect convenient gates and fences in, upon, or adjoining the said railway, for the use of the owners or occupiers of the respective lands, &c., through or over which such railway shall be made, and for the commodious use and occupation of their lands, &c. on either side of the said railway, or for protecting the said lands from trespass or the cattle or other property of the owners or occupiers from straying or escaping thereout, by reason of such railway, or any matter or thing to be done in pursuance of this act; and all such gates, &c. shall be maintained in sufficient repair by the said Company. And by section 182, the Company are required, at their own expense, after any land shall have been taken for the use of the railway, to separate the same from the lands adjoining to such railway with good and sufficient posts, &c., or other fences, in case the owners of such lands adjoining shall desire the same to be so fenced off. The duty, therefore, to make these fences, is no common law duty, but a statutory charge, and the fences being found there, it will be presumed that they were made at the request of the owners of the adjoining land, under this section, which is imperative upon the Company. Or even if the Company have elected to put them up, they are bound to keep them in repair under s. 180. This clause as to notice is not of modern introduction, but is to be found in every act of a similar nature, and is introduced for the purpose of enabling the parties to tender amends: and by the 215th section, it is provided that "where a tender of sufficient amends has been made by or on behalf of any person committing any irregularity, trespass, or wrongful proceeding," the plaintiff is prevented from recovering. If this is a case in which a tender of amends might have been made, notice was clearly necessary. Without going the length of *Sellick v. Smith*, which however was decided by the full Court, (and by

deciding it instantly, they shewed they felt no doubt upon the subject), the defendants were here entitled to notice, as this was an act done or omitted to be done under this act. It is said that the Company carry subject to all the duties and liabilities of the common law. But if the act contained no clause enabling them to carry, it would not have been legal for them to do so: the clauses enabling them to make the railway, and those allowing them to carry goods upon it, are quite distinct: they can only carry by virtue of the 156th clause, and therefore their act in doing so is an act done by virtue and in pursuance of the act, which is sufficient to render notice necessary. In *Blakemore v. The Glamorganshire Canal Company* (a), Lord Eldon says, "that he looks upon all these acts of Parliament as contracts, which have become extremely numerous, and from their number and operation much affect individuals, and that they who come for them to Parliament do in effect undertake, that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else." Here one of the powers given to the Company is to become carriers. In *Wallace v. Smith*, the inconvenience of putting a wide construction upon such words was much urged, but not acted upon by the Court: that case has never been doubted. In *Smith v. Shaw*, and other cases which have been cited, the words "omitted to be done," which occur in section 214, are not to be found. It is not necessary to go further than this—that where amends are to be tendered, the principle of notice applies; and none of the cases cited controvert that proposition.

Lastly—The evidence did not support the declaration in this form.—That was a point reserved; but if not, the defendants have a right to insist on the objection, for it re-

Esch. of Pleas,
1839.

PALMER

v.
THE GRAND
JUNCTION
RAILWAY CO.

(a) 1 Mylne & K. 154, 162

Exch. of Pleas,
1839.

PALMER
v.
**THE GRAND
JUNCTION
RAILWAY CO.**

quired no leave to enter a nonsuit on the improper reception of the evidence; and its inadmissibility determined the action. This is not a common action against carriers, but a special action on the case against the Company, as proprietors carrying on their own railway; and the negligence alleged is confined to the conduct of the carriages. If the negligence proved is of any other kind, the plaintiff cannot recover: *Mayor v. Humphreys*(a). [*Parke, B.*—You should have taken this objection at the end of the plaintiff's case; if you had, the declaration would have been amended: your only objection at the trial was to the reception of the evidence. I think any thing is admissible to shew the cause of the accident, and that it was not the act of God or the queen's enemies]. If the objection had been made, it is very difficult to say whether any amendment could have made the declaration good. It is framed with great care, and has avoided charging the defendants as common carriers, serious doubts having arisen whether all the common liabilities of carriers will attach to companies carrying in this extensive way.—It has been asked whether the Company would be liable for mere *damage or injury* to goods which were safely delivered, and it has been stated that the only ground on which the distinction rests, with regard to carriers not contracting to carry *passengers* safely, is that passengers are contractors themselves. But it may be well doubted whether the more probable reason for the distinction is not, that the passenger is able to get into danger himself. A child is not able to contract for itself—but the immunity from safe carriage extends to children. If the reason be that the person or animal may itself get into danger, that would go to exempt companies carrying animals, &c., in this extensive way from the common liabilities.

(a) 1 Car. & P. 251.

[*Parke, B.*—Is a carrier liable to an action for injury to a horse which is carried or conveyed by being tied at the tail of a waggon?] If the carrier took ordinary care, and the horse, from being a kicker, or other intractability of its own, met with an accident, it is submitted the carrier would not be liable. In *Christie v. Griggs* (a), the distinction between goods and passengers is recognised, but it is not put upon the ground suggested by the other side. The old ground upon which the carrier's extended liability for goods is put, is to prevent on his part collusion with thieves.

Exch. of Pleas,
1839.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

PARKE, B.—The Court are unanimously of opinion that this rule ought to be discharged. The rule was obtained on three grounds: the first was, that the Lord Chief Justice had misdirected the jury, in not leaving to them this question, whether the ticket alleged to have been delivered to the plaintiff's son was read over to him or not, whereas the only question he left to them was, whether the ticket was delivered to him or not. I think the real question in the case has been substantially left to the jury; which was, whether the ticket was produced or not. See what the facts are on the one side and on the other. On the part of the plaintiff the case was, that no ticket was ever delivered to the son, but that by a mistake, if it was delivered, it was delivered to somebody else, and though at the termination of the tunnel the usual demand was made of the tickets, yet the son says he never had any for the horses; that he never was asked for any, or delivered any up. The case on the other side is, that a ticket explaining the non-liability of the Company for horses, was delivered to and received back again from the son; and the Lord Chief Justice left it to the jury to which set of witnesses they would give credit, and they chose to believe the witnesses

(a) 2 Campb. 81.

Exch. of Pleas,
1889.

PALMER
v.
**THE GRAND
JUNCTION
RAILWAY CO.**

of the plaintiff, and not those of the defendant. The case, as to the reading over of the ticket, rests on the same evidence as the delivering of it; and if that was disbelieved, the defendants failed altogether in shewing any limited liability on their part. This disposes, I think, of the first objection. The second objection is, that the Lord Chief Justice was wrong in ruling that no notice of action was required. That turns on the question, whether this is a case in which notice was requisite by the 214th section of the act. If the action was brought against the Railway Company for the omission of some duty imposed upon them by the act, this notice would be required. If, for instance, it was founded on a neglect in not duly fencing the railway, on account of which the travelling on it was dangerous to those passing along it, assuming that such an obligation resulted from the 180th section, or from the general provisions of the act, that case would have fallen within the 214th section. But when the matter is looked at and explained, it appears that the action is not of that nature, but the defendants are sued as common carriers, who have received nine horses for the purpose of being taken to their journey's end, which they have not so delivered, but that on the contrary one has been killed, and three severely injured, in consequence of an accident on the railroad: the action is brought against them, therefore, in their character of common carriers: and it appears to me that a breach of their duty in that character is not a thing omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it. The act does not compel them to be common carriers; it only enables them to be so, so far as they shall think fit; and when they have elected to become so, they are liable in that character, in the same way that other common carriers are. On that ground, I think the 214th section does not apply to this case.

Another objection is then taken, that the declaration is not properly framed to meet the case of a breach of duty in the defendants, as common carriers, in not safely delivering the horses at the end of the journey. Perhaps it is not; and I have some doubt whether the breach in this case is such as to let in proof of non-delivery arising from the accident which happened, and for which the defendants are responsible, as insurers. But it is a settled rule, that counsel ought to take such an objection at the end of the plaintiff's case, to the form of the declaration, where the defect is amendable, which in this case I think it is, for then an amendment might be made. I have the most perfect reliance on what Mr. *Hill* has said, as to his mentioning this point to the learned Judge; but it is clear that at the time it was mentioned, it was stated, not as an objection to the form of the declaration, but as an objection to the receipt of evidence as to the defect in the fences. I am satisfied, knowing the accuracy of the learned Judge who tried the cause, that it never was taken at the close of the case in the correct and proper form, in which an objection to the declaration ought to be, that the breach of the duty, as stated in the declaration, was not supported by the evidence. If such an objection had been made, the plaintiff would doubtless have been allowed to make some amendment in order to remove it. I agree, as has been argued by Mr. *Daniel*, that if in this case the defendants had not been employed as common carriers, no amendment would have saved the plaintiff from being nonsuited; for if he could have shewn that a duty to keep and repair the fences generally was cast upon the Company by the act, and that there had been negligence on their part in that respect, he could not have succeeded, because notice of action would have been necessary. But this is simply a contract to carry goods; which the Company are empowered to do by the 156th section,

Exch. of Pleas,
1839.

PALMER
v.
THE GRAND
JUNCTION
RAILWAY CO.

Exch. of Pleas,
1839.

PALMER

**THE GRAND
JUNCTION
RAILWAY CO.**

which provides, "that it shall be lawful for the said Company, (if they shall think proper, to use and employ locomotive and other engines, or other moving power, and in carriages and waggons drawn or propelled thereby, to carry and convey upon the said railway all such passengers, cattle, goods, wares and merchandize, articles, matters and things as shall be offered to them for that purpose:"—if the Company choose to carry, and do not : take care to accept the goods with a limited responsibility, of which we are to assume there is no evidence in the present case, then the question is, whether the common law duty is not cast upon them; and I am of opinion that it is; and that having received these horses to carry them from Liverpool to Birmingham, and safely deliver them, which they have not done, they are liable, as the accident did not arise from the act of God or the queen's enemies, which are the exceptions in favour of carriers. On these grounds, I think this rule ought to be discharged.

ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

Exch. of Pleas,
1839.

COLCHESTER v. ROBERTS.

TRESPASS for breaking and entering a certain close of the plaintiff called "The Reddings," situate &c., and breaking &c. a gate then standing and being in the said close, and the locks, staples, and hinges with which the same was fastened, and with feet in walking, and also with the wheels of divers carts, waggons, and other carriages, tearing up and subverting the earth and soil of the said close, &c. &c., and then hauling over the said close large quantities, to wit, 100 tons of lime and 100 tons of building materials.

Pleas, first, not guilty. Secondly, that the defendant, long before and at the several times when, &c., in the said declaration mentioned, was the lawful occupier of a messuage and divers (to wit) three closes of land with the appurtenances respectively, situate in the county aforesaid, and near to the said close of the plaintiff in the declaration mentioned, in which &c.: and the defendant further says, that he the defendant, and all the occupiers for the time being of the said messuage and closes of the defendant have, and each of them hath had, used, and enjoyed as of right, and have and each of them hath been accustomed to have, use, and enjoy as of right, for and during the full period of twenty years next before the commencement of this suit, a certain way for himself and themselves, and his and their servants, to go, pass, and repass on foot and with horses, mares, geldings, carts, waggons, and other carriages, from and out of a certain common highway in the county aforesaid, towards, unto,

To a declaration in trespass qu. cl. freg., the defendant pleaded that he and the former occupiers of a house and land had for twenty years used and enjoyed as of right, a certain way on foot and with horses, &c., from and out of a common highway towards, into, through, and over the plaintiff's close to the defendant's house and lands, and back, at all times of the year at their free will and pleasure. The replication averred that the defendant &c. used and enjoyed the right of way mentioned in the plea, but that they did so under the plaintiff's leave and license. At the trial, it appeared that the defendant and the former occupiers of his house and land had an admitted right of way from

thence over the locus in quo to the highway, and across the highway to a close called Reddings, and that for the last twenty years they had had a license from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands over the locus in quo to the highway and back, when they had not any intention of going to Reddings:—*Held*, that the replication was not supported by this evidence, and that the plaintiff was bound to shew a license co-extensive with the right claimed in the plea, and admitted by the replication.

Each. of Pleas,
1889.

COLCHESTER

v.
ROBERTS.

into, through, over, and along the said close of the plaintiff in the declaration mentioned, and in which &c., and from and out of the same towards, unto, and into the said messuage and closes of the defendant, and so from thence back again towards, unto, into, through, over, and along the said close of the plaintiff in the declaration mentioned, and in which, &c., and from and out of the same towards, unto, and into the said common highway, at all times of the year, at the free will and pleasure of the defendant and the said other occupiers for the time being of the said messuage and closes of the defendant, as to the said messuages and closes of the defendant belonging and appertaining: Wherefore the defendant, at the said several times when, &c., being the lawful occupier of his said messuage and closes, and having occasion to use the said way, went, passed, and repassed on foot and with his horses, mares, geldings, carts, waggon, and other carriages in the declaration mentioned, the said carts, waggon, and other carriages then being loaded with the stone, lime, and building materials in the declaration mentioned, in, by, through, and along the said way from the said common highway towards, unto, into, through, over, and along the said close of the plaintiff in the declaration mentioned, and in which, &c., towards, into, and unto the said messuage and closes of the defendant, and so from thence back again, in, by, through, and along the said way, towards, unto, and into the said common highway, as he lawfully might for the cause aforesaid: and in so doing, &c., [justifying the trespasses]. Thirdly, leave and license.

The replication to the 2nd plea was, that the defendant, and all the occupiers for the time being of the said messuages and closes of the defendant, have had, used, and enjoyed the said way in the 2nd plea mentioned, for and during the said period therein also mentioned, by the *leave*,

license, and permission of the plaintiff, to him and them for that purpose granted ; which was denied in terms by the rejoinder.

Each. of Pleas,
1839.

COLCHESTER
v.
ROBERTS.

To the 3rd plea, the plaintiff replied *de injuriâ*.

At the trial before Lord *Abinger*, C. B., at the last Summer assizes for the county of Gloucester, it appeared that the defendant, and the preceding occupiers of his house and lands, had an admitted right of way from thence over the locus in quo to the highway, and across the highway to a close called “Ruddocks ;” and that for the last twenty years they had had a license from the plaintiff to use, whenever they pleased, a way from the defendant’s house and lands, when they had not any intention of going to Ruddocks. The counsel for the defendant contended that the second issue was not supported by the evidence, and that the plaintiff ought to have new assigned. The learned Judge directed the jury to find a verdict for the plaintiff on the first and second issues, subject to a motion to this Court to enter a verdict for the defendant on the second issue. *Ludlow*, Serjt., in Michaelmas Term last, having obtained a rule accordingly,

Talfourd, Serjt., and *W. J. Alexander*, in Hilary Term, shewed cause.—The question is, whether this was a right of way for all purposes, and whether a new assignment was necessary. The defendant by his plea says, that, for all purposes, he and the former occupiers of his house and land have for twenty years used and enjoyed, as of right, the way in question. The replication admits that, but says that it was enjoyed under the plaintiff’s parol license. [Lord *Abinger*, C. B.—It would have been more clear, if you had denied the right pleaded.] No new assignment was necessary, as the parties are agreed as to time, place, and trespasses. [*Alderson*, B.—Your replication puts you in

Exch. of Pleas,
1839.

COLCHESTER
v.
ROBERTS.

the same situation as their plea puts them in. The difficulty is, that you admit all the right claimed, and say that you gave a license for all; whereas your license was only for the difference between the right pleaded and that proved. The question is, whether they are *distinct* rights of way, or one right including the other. If they are distinct rights, your license is supported; if otherwise, it is not.] The defendant should have pleaded his restricted right. [*Parke, B.*—No; the question arises on the replication. You undertake to shew a license as general as they have pleaded their right.] These are two distinct rights of way; and therefore the replication was supported by the evidence.—They cited *Jackson v. Stacey (a)*, *Cowling v. Higginson (b)*, and *Simpson v. Lewthwaite (c)*. [*Parke, B.*—You would say, that if, in support of their plea, they proposed to give evidence of the limited right, you would object that it was not in issue. That is one mode of testing whether they are different ways.]

Ludlow, Serjt., and Whateley, contra.—The plaintiff, by his replication, has admitted that the defendant had exercised the general right set up in the plea, but says it was under his license; then he is bound to shew a license co-extensive with the enjoyment alleged in the plea, and he failed to do so. The plaintiff has therefore not maintained the issue, which was clearly upon him. He has admitted that the defendant had enjoyed a right to go to a public highway, and when he got to the highway, he had a right to go where he pleased.—They distinguished this case from *Cowling v. Higginson*, and relied upon *Barnes v. Hunt (d)*.

Cur. adv. vult.

(a) Holt's N. P. C. 455.

(b) 4 M. & W. 245.

(c) 3 B. & Adol. 226.

(d) 11 East, 451.

The judgment of the Court was now delivered by

Esch. of Pleas,
1839.

COLCHESTER
v.
ROBERTS.

PARKE, B.—The plea to a declaration in trespass *qu. cl. fregit* in this case was, that the defendant and the occupiers of a house and land of the defendant's had for twenty years used and enjoyed, as of right, a certain way on foot and with horses, &c. from and out of a common highway, towards, unto, into, through, and over the plaintiff's close, to the defendant's house and lands and back, at all times of the year at their free will and pleasure. To this there is a replication which, in effect, admits that the defendant and the occupiers of his house and lands, had for twenty years used and enjoyed the way described in the plea as of right, in some sense, but avoids the plea, by stating that such enjoyment during that period was by the plaintiff's licence; and this licence was denied by the rejoinder.

On the trial, it appeared that the defendant, and the preceding occupiers of his house and lands, had an admitted right of way from thence, over the locus in quo to the highway, and across the highway to a close called "Ruddocks," and that, for the last twenty years, they had a licence from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands over the locus in quo to the highway and back, when they had not any intention of going to Ruddocks: and the point to be decided, which was reserved on the trial, is, whether this proof supports the replication; and upon consideration, we think it does not.

The difficulty of this case, (and it is one of considerable nicety), arises from the fact, that one terminus of the way is the high road. If it had been to and from Black Acre, a close of the defendant's in the same situation as the highway, the case would have been plain: for a right to go, not to or from that close as a terminus, but over it to or

Each. of Pleas,
1839.

COLCHESTER

v.
ROBERTS.

from the Ruddocks beyond, would have been a different right. One proof of this is, that if the right of way to Black Acre had been pleaded, it would have been a good replication that the defendant went to or came from Ruddocks beyond, when he committed the trespass, for that would not be an exercise of the *same right*.

A licence, therefore, to use a way to or from Black Acre, would not have included a permission to go to or come from beyond it: and the allegation in the replication that his right of way to the close as a terminus was by the plaintiff's licence, would have been proved. But the terminus here is not a close, but a highway, and whenever a person gets to the highway, he has a right to go on to any place to which it leads, and vice versa. A right of way, therefore, to or from a highway, is in effect a right to go to it, and to each and every place *beyond, to which it leads*. The right of way across the highway to "Ruddocks" is included in the *general* right to the highway, and from thence to all other places. If we apply the same test to this case, as to the supposed one of a right of way to a close, instead of a highway, we shall find that it is so; for to a plea, stating a right of way to the highway, it would not be a good replication to say "that the defendant went to the highway and *thence* to Ruddocks;" it would not be an exercise of a *different* right, but of a part of the *same* general right, and the defendant would not be a trespasser by going to the highway for the purpose of going to Ruddocks, any more than he would be, if he went from the highway to any other place. And if a right alleged in similar terms were traversed, the traverse would include the right of going to the highway and thence to Ruddocks.

The issue, therefore, which the plaintiff undertakes to maintain in this case, is, that the defendant enjoyed the right to go to or from the highway, and every place beyond

to which it leads, to which the defendant might choose to go, by the plaintiff's licence, but such a licence was not proved. For the proof was of an enjoyment by licence to go to the highway and thence to every other place except Ruddocks, to which place the defendant could go of his own right. The issue, therefore, was not proved, and if the verdict were to stand, the defendant would lose his admitted present limited right, for the verdict would be conclusive evidence that he enjoyed it *by licence only*.

Exch. of Pleas,
1839.

COLCHESTER
v.
ROBERTS.

The case is, however, very fit for an amendment of the replication, on payment of costs of the trial; by restricting the allegation of the licence to the exercise of the road for all other purposes than for going to Ruddocks.

Rule accordingly.

BRYANS and Others v. NIX.

TROVER for oats.—Pleas, 1st, not guilty; 2ndly, that the plaintiffs were not possessed as of their own property of the goods and chattels in the declaration mentioned; T., a corn-merchant at Longford, who had been in the habit of consigning cargoes of corn to the plaintiffs, as his factors for sale at Liverpool, and obtaining from them acceptances on the faith of such consignments, on the 31st of January, obtained from the masters of two canal boats (No. 604 and No. 54), receipts signed by them for full cargoes of oats therein stated to be shipped on board the boats, deliverable to the agent of T. in Dublin, in care for and to be shipped to the plaintiffs at Liverpool. At that time boat 604 was loaded, but no oats were then actually shipped on board boat 54. On the 2nd February, T. inclosed these receipts to the plaintiffs, and drew a bill on them against the value of the cargoes, which the plaintiffs accepted on the 7th, and paid when due. On the 6th February, W., an agent of the defendant, who was T.'s factor for sale in London, arrived at Longford and pressed T. for security for previous advances. T., on that day, gave W. an order on T.'s agent in Dublin, to deliver to W. the cargoes of boats 604 and 54, on their arrival there. Boat 604 had then sailed from Longford, but boat 54 was only partially loaded. The loading was completed on the 9th, and T. then transmitted to W. in Dublin a receipt signed by the master of the boat, (in the same form as those sent to the plaintiffs), making the cargo deliverable to W. W. received this on the 10th. On their arrival in Dublin, W. took possession of both cargoes for the defendant.

Held, that the property in the cargo of boat 604 vested in the plaintiffs, on their acceptance of the bill, and that they were entitled to maintain trover for it; but that they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to the plaintiffs, when the receipt for that boat was given by the master.

Quære, whether a document, similar in form to a bill of lading, but given by the master of a boat navigating an inland canal, has the effect of such an instrument in transferring the property in the goods.

Exch. of Pleas,
1839.

BRYANS

v.
NIX.

on which issues were joined. At the trial before *Williams, J.* at the last Liverpool Assizes, the following appeared to be the facts of the case.

The plaintiffs, Messrs. Bryans, Herd, & Co., are factors and commission-merchants in Liverpool; the defendant is a corn-factor in London, trading under the firm of Foster and Nix. A person of the name of Miles Tempany, carrying on business as a shipper and exporter of corn at Longford, in Ireland, under the firm of Gethins and Tempany, had been in the habit of consigning grain to the plaintiffs in Liverpool, as his factors for sale on commission, and from time to time drawing bills of exchange upon them against such consignments. He was also in the habit of making similar consignments to the defendant, as his factor for sale in London, and from time to time drawing bills on him in the same manner. These consignments were forwarded from Longford in boats or barges by the Royal Canal to Dublin, where, on their arrival, they were unshipped and warehoused by John Tempany, the brother of Miles, who managed the business of Gethins and Tempany there, and superintended the purchasing, receipt, or shipping of corn there on account of the firm: and he again superintended the re-shipment of them for their place of destination at Liverpool or London, in vessels procured by the firm of J. and T. Delany, who were the shipbrokers and agents of Miles Tempany at Dublin.

On the 2nd of February, 1837, Miles Tempany, intending to consign a cargo of oats to the plaintiffs, wrote them the following letter, which they received by post on the 4th:—

“ Dear Sir,

“ Longford, 2nd Feb., 1837.

“ The writer has been confined a short time by the influenza, but is now up in his room, and expects to be at large in a day or two. These oats, with the exception of about ten tons, are very fine, and will give you satisfaction. They will be unloaded in Dublin the end of

next week. We have valued on you yesterday for 730*l.* against these, 10*s.* per barrel, which you will please honour. We trust they will net a good deal more. [The rest of the letter is immaterial].

Exch. of Pleas,
1839.

BRYANS

NIX.

“Your’s truly,
“GETHINS & TEMPANY.”

Inclosed in this letter was a bill of exchange, drawn by Tempany (in the name of Gethins and Tempany) on the plaintiffs, for 730*l.*, dated 1st February, payable to Tempany’s order 61 days after date; and also three bills of lading (as they were termed on the part of the plaintiffs) dated Jan. 31st, for oats purporting to be laden on board three boats then in the canal harbour at Longford; one No. 604, signed by Thomas Murtagh, for 480 barrels; another No. 54, signed by Richard Clinch, for 530 barrels; and another No. 88, signed by Patrick Cox, for 460 barrels. The following is a copy of one of these documents:—

“Shipped in good order and condition, by Gethins and Tempany [in and upon the good ship called the] (a) boat 604, whereof is master for this present voyage Thomas Murtagh, and now riding at anchor in the canal harbour, Longford, and bound for Dublin, 480 barrels of oats, marked and numbered as in the margin (b), and are to be delivered in like good order and condition, at the afore-said port of Dublin (the danger of the seas, fire, rivers, and navigation, of whatever nature and kind excepted) unto Messrs. John and Thomas Delany, in care for and to be shipped Messrs. Bryans, Herd, & Co., Liverpool, [or to assigns, he or they paying freight for the said goods] (a) with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of

(a) The words within brackets were struck through with the pen in the original.

(b) There were no marks or numbers in the margin.

Exch. of Pleas, which being accomplished, the other two to stand void.
 1839. Dated in Longford, 31st day of January, 1837.

BRYANS

v.
 NIX.

“ THOMAS MURTAGH.”

That of No. 54, was in the same terms, *mutatis mutandis*. It appeared that both boats were hired, and the boatmen paid, by Tempany.

On receipt of this letter, the plaintiffs accepted the bill of exchange, and on the 7th February returned it so accepted in a letter addressed to Messrs. Gethins and Tempany, 12, St. John's Quay, Dublin, where Miles Tempany had a store, superintended by his brother John Tempany. The letter was received there by John Tempany on the 8th February, and by him forwarded to Miles Tempany, who received it at Longford on the 9th. The bill was paid at maturity by the plaintiffs.

It appeared also, that about this time the defendant Nix was pressing Miles Tempany for payment of a balance due to him; and on the 3rd February, the defendant wrote informing him that he had sent over a Mr. Walker, “empowered to take such steps on his (the defendant's) behalf as circumstances might render necessary.” On the 6th February, Walker arrived in Longford, and pressed Tempany for security. At that time boat 604 was on its voyage for Dublin, having the 480 barrels on board: boat 54 was still in the canal harbour at Longford, partly loaded, the loading having begun on the 1st February, and about 400 barrels being then on board. It was proved also that for some days before the 1st February, these oats had been put apart in a room, where they were undergoing the process of kiln-drying. Walker prevailed upon Miles Tempany to give him the following written order on John Tempany:—

“ Longford, 6th February, 1837.

“ Please deliver up and place at the disposal of Mr. J. W. Walker the above-mentioned boats of oats, together

with five or six half-barrels now in store at Dublin, per *Erech. of Pleas,*
account of Messrs. Foster and Nix, London. 1839.

“ MILES TEMPANY.”

BRYANS
&
NIX.

The boats specified were 252, 604, 54, (stated to be 560 barrels), 88, and 196. Walker proceeded with this order to Dublin, and there obtained from John Tempany the following written undertaking:—

“ I hereby engage to deliver up, and place at your disposal, the first five boats of oats that may arrive from Longford, say about 2,300 barrels, together with what Longford oats now in store, say from 2 to 300 barrels, and to have the same re-shipped for account of Messrs. Foster and Nix, London.

“ Dublin, 8th February, 1837.

“ JOHN TEMPANY.”

“ To Mr. J. W. Walker.”

The loading of boat 54 was completed on the 9th February, 550 barrels of oats being put on board, and Miles Tempany induced Clinch, the master, to sign another bill of lading for the cargo, in the same terms as the former, except that it was made deliverable to Foster and Nix instead of to the plaintiffs. This was transmitted to Walker in Dublin, and received by him there on the 10th. Notwithstanding John Tempany's undertaking, however, the oats were not delivered to Walker on their arrival in Dublin, but were discharged out of the canal boats on board a vessel called the *Minerva*, then lying in the port of Dublin, which Messrs. Delany & Co., shipbrokers, had, by the directions of John Tempany, chartered for London on the account of Gethins and Tempany, in whose names receipts for them were signed by the mate. Walker (who had previously obtained from John Tempany the key of the store) thereupon instituted a replevin suit in the Court of Queen's Bench in Ireland against the master

Exch. of Pleas,
1839.

BRYANS

• NIX.

of the *Minerva*, in consequence of which the oats were re-landed, and ultimately delivered to Walker for the defendant. The cargoes of boats 604 and 54 having been demanded by the plaintiffs from the defendant, and refused, this action was brought to recover the value of them.

It was contended for the defendant, at the trial, first, that the (so-called) *bills of lading*, under which the plaintiffs claimed the property in the cargoes, were in truth nothing more than *boat-receipts*, having no greater legal operation than the receipts given by any other inland carrier, and therefore could not have the effect of transferring the property in the goods: and that no contract was proved by which the plaintiffs acquired any property in the oats prior to the title given to the defendant by Tempany's order of the 6th February; that the plaintiffs, being mere *factors*, could only have a *lien*, arising on the actual receipt of the goods; that at all events this was the case as to boat 54, the cargo of which was not loaded at the time when the bill of lading transmitted to the plaintiffs was signed, and the bill of exchange drawn. The learned Judge thought the documents in question were equivalent in their legal operation to ordinary bills of lading, and that the plaintiffs were entitled to recover; but he also directed the attention of the jury to the circumstance, that the loading of boat 54 was not completed when the receipt for that cargo was signed by the master, and asked them to consider, whether, although the loading was not complete, the oats to be put on board were designated and appropriated to the plaintiffs; as, if they were, he was of opinion that they were entitled to recover the full value of that cargo also. The jury found a verdict for the plaintiffs, damages 665*l.* 10*s.*, stating their opinion, that at the time the receipts were given, the cargo for boat 54 was specially designated, although the loading was not complete. Leave was thereupon given to the defendant to move to reduce the damages by the sum

of 344*l.* 10*s.*, the value of the oats shipped on board boat 54. *Exch. of Pleas,*
1889.

In Michaelmas Term, *Kelly* accordingly obtained a rule nisi to reduce the damages accordingly, or for a new trial, citing *Kinloch v. Craig* (a), *Nichols v. Clent* (b), and *Bruce v. Wait* (c). During the present sittings—

BRYANS

v.
NIX.

Cresswell and *Tomlinson* shewed cause.—The only question in this case is, whether Miles Tempany had given to the plaintiffs a valid lien upon both or either of the two boat-loads of oats in dispute, before they were transferred to the defendant. And it is submitted, that the documents transmitted by Tempany to the plaintiffs, with the letter of the 2nd February, whether they be properly *bills of lading*, or merely (as they were designated by the defendant at the trial) *boat-receipts*, vested the property in the plaintiffs.

First, these were bills of lading, and if so, being transmitted for a valuable consideration, they operated to change the property immediately on the shipment of the goods; and it makes no difference that the plaintiffs are factors, and not vendees: *Haille v. Smith* (d), *Patten v. Thompson* (e). There is no precise legal definition of a bill of lading:—it is only the symbol of the property in goods existing at some distant place, which are to come on board ship to the consignee. And it can make no difference whether they are to come by sea, or by inland navigation: nor can the nature of the vessel, its size, build, or rigging, make any difference; many smaller vessels than canal boats, pass over sea; e. g., the Madeira and Portugal fruit-vessels: so, a Humber keel is without sails or rigging. When the party has possession of that which is the symbol of and represents the property in the goods, it

(a) 3 T. R. 119, 783.

(b) 3 Price, 547.

(c) 3 M. & W. 15.

(d) 1 Bos. & P. 563.

(e) 5 M. & Selw. 350.

Exch. of Pleas,
1889.

BRYANS

v.
NIX.

confers on him a valid lien; and it is not necessary for this purpose that he should be the purchaser. Thus, the transfer of a dock-warrant is a constructive delivery of the goods: *Zwinger v. Samuda* (a). Again, can it make any difference in the case that the corn is transshipped at Dublin, and sent forward by another ship to England? That is a state of circumstances foreseen and provided for at the commencement of the voyage. A good bill of lading might surely be made for a cargo consigned from Dublin to an inland town in England, as Birmingham: or to be delivered to an agent in Liverpool, and thence forwarded to Birmingham. Suppose a shipment of goods from Canada, through England, to New South Wales: could the transshipment here affect the operation of the bill of lading? It would be just as much a symbol of the property, whether the goods were to remain in England, or to be carried forward in pursuance of the original intention of the shipper. If a document such as this would be a bill of lading for a voyage from Longford to Liverpool, why not for that part of the voyage from Longford to Dublin?—it is no necessary quality of a bill of lading that it must represent the cargo throughout the whole voyage. It was clearly proved that the course of business was for the factors to make advances on the faith of these documents: they were therefore considered as the indicia or representatives of the goods themselves, and credit was given to them as such. That is the true characteristic of a bill of lading.

But secondly, taken as *boat-receipts* or invoices only, the effect of the transfer of these documents was to give the plaintiffs a lien:—and for this purpose also, it is the same whether the parties are vendees, or factors who have accepted against the goods; the latter equally purchase a right to hold the goods. In *Mason v. Lickbarrow* (b),

(a) 1 Taunt. 265; 1 B. Moore, 12.

(b) 1 H. Bl. 363.

Lord *Loughborough* says,—“ A destination of the goods by the vendor to the vendee, the marking them, or making them up to be delivered, or removing them for the purpose of being delivered, may all entitle the vendee to act as owner against a third person, into whose hands they have come.” Suppose the vendor wrote to say he had put aside for A. goods in a particular room, and would keep them for him, if he would accept a bill against them, and on that representation he did so:—the vendor could not afterwards dispose of them to defeat A.’s right. In *Craven v. Ryder* (a), it was held that the holder of a lighterman’s receipt retains a control over the goods, at least until he has exchanged it for the bill of lading. In *Patten v. Thompson* (b), Lord *Ellenborough* says,—“ If it is to be taken that the cargo was consigned to the Liverpool house (who were the vendee’s factors for sale), as a security for advances made by them, this may afford a ground for their claim to detain the same until such time as they are indemnified against these advances, or the responsibility they have contracted in respect of the cargo.” And again,—“ If there had been any specific pledge of this cargo in the course of the transaction, if bills had been accepted by the Liverpool house on the credit of this particular consignment, or if it had been so stipulated, that would have been a different case.” That is the present case. In *Abbott on Shipping*, p. 214, it is said :—“ The master must make out his bill of lading according to the directions of the shipper of the goods, or the holder of the receipt given on the shipment, for the shipper has a right to name the consignee to be mentioned in the bill of lading, even although it may not be expressed in the receipt that the goods are shipped for his account, this being tacitly understood.” That must mean that the receipt is the evidence of title. In *Holl v. Griffin* (c), it

Exch. of Pleas,
1839.

BRYANS
v.
NIX.

(a) 6 Taunt. 433.

(b) 5 M. & Sel. 356.

(c) 10 Bing. 246; 3 M. & Scott,
792.

Esch. of Pleas,
1839.

BRYANS

^{o.}
NIX.

was held that the transfer of a *wharfinger's* receipt operated as a transfer of the property: and *Tindal, C. J.*, said, "it had been the practice to consider money advanced on a wharfinger's receipt in the same light as advanced on an actual delivery of goods." A wharfinger's receipt can have no greater legal efficacy than the receipt of the master of a canal boat: in each case it is the symbol of property by the usage of trade;—the evidence of an undertaking that he holds the goods for a particular party, and will deliver them to him. In the present case, there was abundant evidence of a contract to appropriate the goods to the plaintiffs on their acceptance of the bills and of a performance of that contract before the transfer of any title to the defendant. It appeared that both the plaintiffs, and Foster and Nix also, had long been in the habit of accepting largely on the faith of such documents: and Walker, the defendant's agent, had full notice that the oats were put on board the two boats for the plaintiffs and that they had accepted against them. [*Parke, B.*—In order to pass the property, the specific chattels must be ascertained which are to pass. Now here the oats loaded on board the boat No. 54, at the time when the receipts were transmitted, were still in Tempany's premises, and he might have performed his contract with the plaintiffs by supplying any other oats of the same quality and amount. Your argument must go to the extent that Tempany would have been liable in trover if he had substituted others for them.] The cargo was actually provided and prepared for the shipment, although not all on board; and the jury have found that the particular oats were specially designated as the cargo for boat 54. This document was therefore evidence of a contract that those particular oats should be held by the plaintiffs on acceptance of the bill, and the shipper could not, under such circumstances, give them a different direction. [*Parke, B.*—This is a written contract, applying to goods "shipped:" you are

substituting a different contract.] They were specifically set apart and identified, and so fully appropriated to the plaintiffs. [*Parke*, B.—The letter contains an untrue representation that the goods are then on board, and those goods he, Tempany, engages to assign to the plaintiffs as mortgagees on their acceptance. *Alderson*, B.—The goods he describes in his letter are, in truth, non-existing goods.]

Exch. of Pleas,
1839.

BRYANS

v.
NIX.

But it may be questioned whether Tempany, or any person claiming under him by a subsequent title, is not estopped to say that the property did not pass to the plaintiffs. Where a party grants a lease of land which does not then belong to him, but of which he afterwards becomes the owner, and then demises to another, the first lease will operate against both the owner and the second lessee by estoppel, and ejectment may be brought upon it. So here, the same goods being afterwards loaded, and the plaintiffs having accepted according to the contract, the shipper was estopped afterwards to take advantage of his own wrong, and confer a better title on another party. The master, by putting his name to the receipt for boat 54, acknowledged that he had a cargo deliverable to the plaintiffs, which although it was not then on board, yet as soon as he received one exactly corresponding with the receipt, was held by him for the plaintiffs, who would have had a right to take possession of it by themselves or their agent, and the master would have been estopped to say he had not signed the receipt. *Rawlyns's Case* (a), *Helps v. Hereford* (b), *Doe d. Christmas v. Oliver* (c), are authorities to support the analogy contended for. The defendant can have no better title than that which the shipper and the master could give him; and that is posterior in date to the title of the plaintiffs, which, at the latest, was perfected by estoppel on the 8th of February,

(a) 4 Rep. 52.

(b) 2 B. & Ald. 242.

(c) 10 B. & Cr. 187; 5 Man. & R. 202.

Exch. of Pleas,
1839.

BRYANS

v.
NIX.

when the full cargo was put on board; whereas the defendant's bill of lading was not signed till the 9th; or, if it be considered as evidence of a contract, was not accepted by him until the 10th or 11th. And if he relies on the letter from Miles to John Tempany of the 6th of February, or the undertaking by John Tempany on the 8th, he is in no better position; for the latter had no operation in present, —it could have no effect until the completion of the voyage at Dublin; nor was the letter addressed to the party having at the time possession of the goods.

Kelly, Alexander, and Martin, contra.—The transactions between Miles Tempany and the plaintiffs, at Longford, amounted to a contract only, and no property in the goods passed thereby to the plaintiffs. Their only remedy, therefore, is for a breach of that contract, and they have acquired no such rights in the specific goods as to enable them to maintain trover.

First, these documents are not bills of lading, or documents equivalent to them, and have none of their incidents or consequences. It is of the greatest importance that a *bill of lading*, which is made the instrument of transfer of the property itself, and which has acquired a known character in the law merchant in all countries, should be distinctly understood and defined, and its powers confined to documents which are clearly of that nature and character. The term was never, until now, applied except to the well known mercantile instrument, signed by the master of a vessel passing along the high seas, or along some estuary or navigable river between port and port. This instrument is false in every particular which gives it the form or appearance of a bill of lading. The goods are not *shipped*, but put on board a common canal boat; there is no *voyage*, properly so called; the vessel is not *riding at anchor*; there are no marks or numbers, and the terms *freight*, *primage*, and *average*, are wholly inapplicable. It is a mere receipt

by a boat-carrier for goods to be carried from Longford by canal to Dublin, and there to be delivered to any agent of Tempany. There is in fact no difference between this case and that of a parcel of goods sent from London by waggon or by the railway to York, and a receipt taken from the carrier. Could not the sender countermand their direction if he chose? If a carrier's receipt is to be held equivalent to a bill of lading, the effect will be, that the owner cannot, if he make a mistake, take the goods out again. It is said this is a bill of lading, the effect of which was to terminate at Liverpool, not at Dublin. If that be so, the real bills of lading from Dublin to Liverpool will be deprived of operation or validity by these, which are mere fictitious instruments. A bill of lading covering the whole voyage would never be signed, except where the goods were to go through in the same vessel. *Holl v. Griffin*, which is the only case cited in which there was any thing at all analogous to a carrier's receipt, is clearly distinguishable; there the defendant, on sight of the wharfinger's receipt, and before the goods arrived, promised to deliver them to the plaintiff on their arrival, and it was held that the plaintiff might maintain trover against him, on his refusal to deliver them after their arrival. That was the case of a transfer of property notified to the defendant, and assented to by him. The present more resembles the cases where money has been transmitted to bankers for a certain person, to whom they are not liable until they have assented to hold for him: *Williams v. Everett* (a).

But secondly, assuming that such instruments as these could be effective to pass the property as between *vendor and vendee*, they will not do so in this case, which is between *principal and factor*; the plaintiffs being factors merely, all that they can acquire is a lien, which must be coupled with possession: *Kinloch v. Craig* (b). In *Haille v. Smith*, there was a regular bill of lading, duly indorsed

East. of Pleas,
1839.

BRAYNE

v.
NIX.

(a) 14 East, 582.

(b) 3 T. R. 119, 783.

Exch. of Pleas,
1839.

BRYANS

v.
NIX.

to the defendant; nor was that a case of principal and factor; there was an agreement for a valuable consideration that the transferees should hold the goods as trustees for third parties; they were not pawnees but bargainees. In *Patten v. Thompson*, Lord *Ellenborough* says, referring to *Haille v. Smith*,—"That was a specific pledge of the cargo by indorsement and delivery of the bill of lading, upon an agreement between the parties that the cargo should be held as a collateral security." The case of *Patten v. Thompson* proceeded expressly on the ground, that as between principal and factor, the factor has no lien until possession. [*Parke B.*, referred to *Anderson v. Clark (a)*]. There it appeared that the shipper of the goods had acted as the agent of the consignee. [*Parke, B.*—I was engaged in that cause, and I know that the ground of the decision was the existence of an agreement between the parties, as proved by the correspondence, that the goods should vest in the factor as a security for antecedent advances.] The judgment of the Court is very shortly reported, and it appears to be inconsistent with *Berkley v. Walling (b)*. There is no other case in which a contract of this description has been held to vest the property, unless there has been also a regular bill of lading. The boat-owner is in no respect the agent of the plaintiff, but only of Tempany, who hires and pays him.

Lastly, with regard to the boat No. 54, the plaintiffs have clearly no title to that cargo. When the boat-receipt for it was signed, the cargo was in the warehouse of the consignor: and it is impossible to say that there was a transfer of property in those specific oats, merely by means of the false representation in Tempany's letter. There was a mere intention to put the oats on board, to be sent to the plaintiffs, but that intention was altered;

(a) 2 Bing. 20.

(b) 7 Ad. & E. 29; 2 Nev. & P. 178.

and the master never did receive them to be shipped for the plaintiffs, but received them for the defendants.

Esch. of Pleas,
1839.

BRYANS
v.
NIX

Cur. adv. vult.

The opinion of the Court was delivered on the last day of the sittings by—

PARKE, B.—The question in this case is, whether the property in the oats on board two boats, No. 604, and No. 54, or either of them, was vested in the plaintiffs at the time the defendants took possession of those oats. We think that the property in the former was in the plaintiffs, in the latter not.

The facts of the case, necessary to its determination, may be very shortly stated. Miles Tempany, a corn-merchant at Longford, who employed the plaintiffs as his factors at Liverpool, shipped on board the boat, No. 604, a full cargo of oats, and took a bill of lading or boat-receipt for them, signed by the master, bearing date the 31st of January, 1837, whereby he acknowledged the receipt of the oats on board, deliverable in Dublin to John and T. Delany, *in care for and to be shipped to the* plaintiffs in Liverpool. On the same day, he procured from the master of another boat, No. 54, a like bill of lading or receipt, for 530 barrels, but no oats were then on board that boat, although, a cargo was prepared for that purpose. On the 2nd of February, Tempany wrote to the plaintiffs a letter inclosing both those instruments, and stating that he had valued on the plaintiffs for 730*l.* *against those* oats. On the 7th, the plaintiffs received this letter, and accepted the bill of exchange, and returned it to Tempany, who received it on the 9th.

In the mean time, the defendant, who was a creditor of Tempany to a considerable amount, sent over Mr. Walker, an agent, to Longford. Walker arrived on the 6th, and pressed him for security. Tempany consented

Exch. of Pleas,
1839.

BRYANS

^a
NIX.

on that day to give him an order, addressed to Tempany's brother, his agent in Dublin, desiring him to deliver to Walker, for the defendant, the cargo of boat 604, which had then sailed for Dublin, and four other cargoes, including that of boat 54 (which was stated to be 560 barrels), and also all that was in Tempany's store in Dublin. The boat 54 was then partially loaded, and Tempany promised to send the boat-receipt for it to Walker. The loading was completed on the 9th, the boat-receipt or bill of lading, for 550 barrels, which were on board, signed by the master and transmitted to Walker, to whom the cargo was made deliverable, and he received it the next day. The boats were both hired by Tempany, and the men paid by him. Walker, on the 8th, procured an agreement from J. Tempany, in Dublin, to hold the oats for him, when they arrived: and he afterwards got possession of the whole by legal process.

It was contended, that, under these circumstances, the property in neither cargo vested in the plaintiffs; first, because the instruments were not regular bills of lading, and could give no title; and secondly, if they were, they could not operate to give the plaintiffs a title, because they, being factors, could acquire no lien without actual possession.

We think it unnecessary to decide whether the instruments were regular bills of lading, so as to have all the properties which the custom of merchants has attached to those documents. We need not say, whether, like bills of lading, they are the symbols of property, so that their transfer by indorsement is equivalent to an actual delivery of the goods, which they represent, in specie; nor whether they have the privileges which by the factors' act are given to such instruments. These are matters wholly collateral to the present inquiry. The true question here is, what is the meaning and effect of the two documents, by whatever name they are called, coupled with the letter from Tempany, of the 2nd of February, followed by the ac-

acceptance by the plaintiffs of Tempany's draft? It seems to us to be clearly this,—that Tempany agrees that the oats therein specified, shall be held from that time by the boat-masters, for the plaintiffs, in their own right, provided they accept the bill, as a security for its payment—that the masters agree so to hold them, and that, by the plaintiffs' assent and acceptance of the bill, the conditional agreement becomes absolute. The transaction is in effect the same, as if Tempany had deposited the goods with a stakeholder, who had assented to hold them, for the plaintiffs, in order to indemnify them. As evidence of such a transaction, it is wholly immaterial whether the instruments are bills of lading or not: and it might equally be proved through the medium of carriers' or wharfingers' receipts, or any other description of document, or by correspondence alone. If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship-master, employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property; and the depositary assents; it is enough: and it matters not by what documents this is effected; nor is it material whether the person who is to have the property be a factor or not; for such an agreement may be made with a factor, as well as any other individual.

In the present case we are of opinion that this is satisfactorily made out, with respect to the first boat-load: and the fact that the instrument signed by the master, specifies that the goods are to be carried to and delivered at Dublin, to an *agent of the plaintiffs*, is decisive to shew that the plaintiffs are to take *immediately* in their own right, and are not mere consignees of Tempany, who are to have their lien when the goods arrive, as factors. And

G G G 2

Reck. of Pleas,
1889.

BRAYNE
Nik.

Exch. of Pleas,
1839.

BRYANS

v.
NIX.

this case is distinguishable, on this ground, from *Kinlock v. Craig*, *Bruce v. Wait*, and *Nichols v. Clent*, in none of which was there any documentary or other evidence to prove that the intention of the consignors was to vest the property in the consignee *from the moment of delivery to the carrier*: and the case resembles that of *Haille v. Smith*, where the bill of lading being transmitted for a valuable consideration, operated as a change of property instant, when the goods were shipped; and it is also governed by the same principle upon which I know that of *Anderson v. Clark* was decided, where a bill of lading, making the goods deliverable to a factor, was, upon proof from correspondence of the intention of the principal to vest the property in the factor, as security for antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery.

In our opinion, therefore, the plaintiffs had a complete title to the cargo of the boat 604, at least on the 7th of February, when they complied with the condition by accepting the bill: and before the 7th, no other title to the oats intervened; for the order to deliver them to Walker, given on the 6th, was clearly executory only. But the claim of the plaintiffs to the cargo of boat 54, stands on a very different footing.

At the time of the agreement, proved by the bill of lading or boat-receipt of the 31st January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board; and consequently no *specific chattels* which were held for them. The undertaking of the boat-master had nothing to operate upon, and though Miles Tempany had prepared a quantity of oats to put on board, those oats still remained his property; he might have altered their destination, and sold them to any one else; the master's receipt no more attached to them, than

to any other quantity of oats belonging to Tempany. If indeed, after the 31st of January, these oats so prepared, or any other like quantity, had been put on board to the amount of 530 barrels, or less, *for the purpose of fulfilling the contract, and received by the master as such*, before any new title to these oats had been acquired by a third person, we should have probably held, that the property in these oats passed to the plaintiffs, and that the letter and receipt, though it did not operate, as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs, that Tempany should put such a quantity of oats on board for the plaintiffs, and that when so put, the master should hold them on their account: and when that *agreement was fulfilled*, then, but not otherwise, they would become their property. But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded, and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant, to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due to him; for such is the effect of the delivery order of the 6th, and the agreement with Walker, of the same date, to send the boat-receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory: on the 9th this appropriation took place, by the boat-receipt for the 550 barrels *then on board*, which was signed by the master, at the request of Tempany; whereby the master was constituted the agent of the defendant to hold these goods; and this was the first act by which *these oats* were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading, *on account of the plaintiffs*, but he did not do so.

Exch. of Pleas
1839.

BRYANS

NIX.

Reck. of Pleas,
1889.

BRYANS
v.
NIX.

It is proper, however, to notice the very ingenious argument used on the part of the plaintiffs, founded on the doctrine of estoppel, as applied to real estate. If a man, by indenture, demise a certain manor, which he has not, and then purchases the manor, and afterwards sells or demises it to B., the first lease operates against the purchaser or second lessee; and by analogy to this case, it is contended that the first bill of lading was good for the plaintiffs by estoppel, against the master, and consignor; and against the defendant, who claims that cargo which was put on board under the consignor. But this analogy does not hold; in the case of real property, the lease is a conclusive admission by the lessor, that he has a title to the *specific estate* demised, which binds a subsequent purchaser of that estate: here the bill of lading is a conclusive admission only that *some* oats, amounting to the specified quantity, were on board. In the former case, the estate is identified and ascertained at the time of the admission: in the latter, no property existed to which the admission applied, for no oats were on board; and they are no otherwise ascertained, than by that statement that they were on board; and the person who afterwards purchases any oats from the consignor, might as well be said to purchase those to which the estoppel relates, as he who purchases those which were afterwards put on board. And besides, it may well be doubted whether the doctrine of estoppel applies to personal chattels at all, so as to bind a subsequent purchaser of them.

For these reasons, we think that the plaintiffs are entitled to the first cargo of oats, but not to the other; and the rule must be discharged as to boat 604, and the verdict reduced by the value of boat 54.

Rule accordingly.

Exch. Chamber,
1839.

IN THE EXCHEQUER CHAMBER.

NELSON and Wife v. SERLE.

THIS was a writ of error from the judgment of the Court of Exchequer in the case of *Serle v. Waterworth* (a), the defendant Mrs. Waterworth having since married Nelson, the now plaintiff in error. It was an action of debt on a promissory note for 24*l.* 1*s.* 4*d.*, value received, dated the 3rd January, 1837, made by the defendant, (the now plaintiff in error,) payable twelve months after date to the plaintiff. The defendant pleaded, that one Joseph Waterworth, before and at the time of his death, to wit, on the 2nd January, 1837, was indebted to the plaintiff in a certain sum of money, to wit, the sum of 24*l.* 1*s.* 4*d.*, for the price and value of goods by the plaintiff before then sold and delivered to the said J. Waterworth, which sum was due and owing to the plaintiff at the time of the making of the promissory note in the first count mentioned; and that the plaintiff, after the death of the said J. Waterworth, and before the making of the said note, to wit, on the 2nd January, 1837, applied to the defendant for payment thereof; whereupon, in compliance with the said request, the defendant, after the death of the said J. Waterworth, for and in respect of the said debt so then remaining due to the plaintiff as aforesaid,

To a declaration in debt on a promissory note for 24*l.* dated 3rd January, 1837, made by the defendant, payable twelve months after date to the plaintiff, the defendant pleaded that one J. W., before and at his death, was indebted to the plaintiff in 24*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, after the death of J. W., applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after the death of J.

W., for and in respect of the debt so remaining due to the plaintiff as aforesaid, and for no other consideration whatever, made and delivered the note to the plaintiff, and that J. W. died intestate, and that at the time of the making and delivery of the note, no administration had been granted of his effects, nor was there any executor or executors of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid; and the defendant averred that *there never was any consideration for the said note except as aforesaid.*—*Held*, that the plea was a good answer to the declaration.

Exch. Chamber,
1839.

NELSON
v.
SERLE.

and for no other consideration whatever, then made and delivered the said note to the plaintiff: and the defendant further says, that the said J. Waterworth died intestate, to wit, the same day and year aforesaid, and that at the time of the making and delivery of the said note to the plaintiff as aforesaid, no administration had been granted of the estate and effects of the said Joseph Waterworth, nor was there at that time any executor or executrix of the estate and effects of the said Joseph Waterworth, nor was there at that time any person liable for the said debt so remaining due to the plaintiff as aforesaid. And the defendant further says, *that there never was any consideration for the said note except as aforesaid.* (a) Verification. Replication, de injuriâ, on which issue was joined.

The Court of Exchequer having held that the plea was not a sufficient answer to the action on the note, a writ of error was brought, which was now argued by

Addison, for the plaintiffs, in error.—The question in this case is, whether this plea is a good answer to the action, or whether judgment non obstante veredicto ought to have been entered for the plaintiff. The averment at the end of the plea, that there never was any consideration for the note, was overlooked on the argument in the Court below (b). The defence set up by the plea in reality was, that there never was any consideration for the giving of the note. In the Court below, it was said that the forbearance to sue would be a good consideration; but it does not appear that there was any connexion or relationship between the defendant below and the deceased, in respect of which she could be liable. [*Tindal*,

(a) See note below.

(b) That averment was by some mistake omitted in the briefs in the case of *Serle v. Waterworth*,

and the Court below gave judgment on the assumption that there was no such averment in the plea.

C. J.—You say it is the same as if a perfect stranger passing by at the time, on being told that a debt was due, had given the note.] Certainly. The case of *Jones v. Ashburnham* (a) is expressly in point. There the plaintiff declared that A., since deceased, was indebted to him so much, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, *would forbear and give day of payment* of the debt, (not stating to whom he was to forbear), the defendant promised, &c.; and it was held to be no consideration for the promise; for a promise could only be sustained on a consideration of benefit to the defendant, or of detriment to the plaintiff: and unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. That case is on all fours with the present, and shews that forbearance to a person not liable is no consideration; the only difference is, that this was the case of a promissory note, which imported a consideration, and that since the new rules such a defence must be pleaded. In the judgment in the Court below, Lord Abinger, C. B., says, “It appears to me that the real question is, whether, on the face of the declaration and plea together, there could be any consideration for this note, as between the plaintiff and defendant; and I think that the plaintiff’s being placed in the condition that he could not, at all events, sue the defendant for twelve months, although she took out administration in the meantime, was a sufficient consideration.” And Parke, B., says—“If it had shewn that there were no assets, it would probably have gone far enough to negative all consideration; but it does not; and the effect of the note, at all events, is to tie up the plaintiff’s hands against the defendant, in case she should take out administration or intermeddle with the assets, for a year.”

Exch. Chamber,
1839.

NELSON
v.
SERLE.

(a) 4 East, 455.

Exch. Chamber,
1839.

NELSON
v.
SARLE.

This plea, it is submitted, does contain a substantial averment that there were no assets. Again, what detriment was it to the plaintiff, "to tie up his hands," where he never had any right to recover against the defendant? or what benefit was it to the defendant? If there had been any other consideration, it was for the plaintiff to shew that by his replication.

Wightman, contra. — The judgment of the Court below was correct. The defendant is under a mistake, in applying the expression *consideration* to the circumstance of her having assets or not. The question was, whether there being a debt due, there could be a consideration of *forbearance*. [*Tindal*, C. J.—Have you any right to guess, that by any accident the defendant would take out administration in the course of the year?] In *Ridout v. Bristow* (a), where a widow gave a promissory note "*for value received by my late husband*," it was held that the note was valid on the face of it. In that case *Bayley*, J., says, "You may bind yourself by an instrument which, in its form, imports consideration, without expressing the consideration or proving it aliunde;" and he cites the case of *Popplewell v. Wilson* (b), as establishing "that a promissory note is binding, though it purport on the face of it to be for the debt of a third person." So here the plaintiff contends, that if a stranger is told that a debt is due, and he gives a promissory note, which imports a consideration, it would be binding. [*Bosanquet*, J.—You say that a debt is due, but in this case there was no person that could be sued.] There was a debt due from a person who is dead, and that is the same, as respects consideration, as if it were a living person, because there may be assets, or at least respect for the memory of the deceased.

(a) 1 Cr. & J. 231.

(b) 1 Stra. 264.

[*Bosanquet, J.*—In *Ridout v. Bristow* there was a *prima facie* right to take out administration.] The consideration here is a debt from the deceased Joseph Waterworth ; and unless the plea exclude every case in which there may be a good consideration, that is sufficient. The defendant was bound to exclude every consideration whatever. There was nothing to shew she was not executrix, or might not become so. The defendant was bound to shew that the promissory note, which imports a consideration, had in reality no value : if it *might be* for good consideration, it is sufficient. The Court below say that the defendant has not shewn those circumstances which prove that there could be no consideration. A person who gives a promissory note, by so doing, *prima facie* admits that he has had value for it.

Exch. Chamber,
1889.

NELSON
v.
SERLE.

Addison, in reply.—In *Ridout v. Bristow*, the note was proved (under non assumpsit) to have been given by the widow “for value received by her late husband ;” here it does not appear that the defendant was at all connected with the deceased. *Alderson, B.* said, in this case, in the Court below, that the question in *Ridout v. Bristow* was “whether, it being expressed on the face of the note that it was given for the debt of her late husband, that necessarily shewed a want of consideration, and the Court held that it did not, because the plaintiff’s remedy might be delayed against the executor or administrator ; but here there is a distinct averment that no person was liable for the debt.” The doctrine contended for on the other side is extravagant.

Lord DENMAN, C. J.—It appears to me, that in reversing this judgment, we do not interfere with the law pronounced by the Judges of the Exchequer, because they acted on *Ridout v. Bristow*, and it turns out that the facts of that case do not apply. It appears that there the defend-

Exch. Chamber,
1839.

NELSON
v.
SERLE.

ant was the wife of the intestate, and his administratrix, and the question there arose on non assumpsit; and so it must have been in *Popplewell v. Wilson*.

Judgment reversed.

MEMORANDA.

IN Hilary Term, Mr. Baron *Bolland* resigned his seat in this Court, on account of continued indisposition, and in the vacation following, *William Henry Maule*, Esq., one of her Majesty's counsel, was appointed to succeed him, and having been first called to the degree of the coif, gave rings with the motto "Suum cuique." He took his seat in this Court on the first day of Easter Term.

In Hilary Vacation, *William Goodenough Hayter*, Esq., of Lincoln's Inn, received a patent of precedence; and *John Stuart*, Esq., of Lincoln's Inn, *Samuel Girdlestone*, Esq., of the Middle Temple, and *Robert Vaughan Richards*, Esq., and *Griffith Richards*, Esq., of the Inner Temple, were appointed her Majesty's Counsel.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

ACCOUNT STATED.

See PLEADING, I. 1.

The acceptor of a bill, on application to him for payment, answered that the bill had been altered as to the acceptance, by being made payable at a particular place; that he never made it payable there, nor elsewhere than at his own house, and that he should take such steps as the law would authorize on the subject; that he had been prepared for payment, and the party might have the money by calling at his house:—*Held*, that this letter was no acknowledgment of a subsisting debt, so as to support a count on an account stated. *Calvert v. Baker*, 417

ACTION ON THE CASE.

By whom maintainable.

In case, the declaration stated that L., the father of the plaintiff, bargained with the defendant to buy of him a gun, to wit, *for the use of himself and his sons*; and the defendant then, by falsely and fraudulently warranting the gun to have been made by N., and to be a good, safe, and secure gun, then sold the gun to L. for the use of him-

self and his sons, for 24*l.*, whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the gun was not made by N., nor was a good, safe, and secure gun, but on the contrary thereof, was made by a maker very inferior to N., and was a bad, unsafe, ill manufactured and dangerous gun, and wholly unsound and of very inferior materials, of all which the defendant, at the time of such warranty and sale, had notice; and that the plaintiff, *knowing and confiding in the said warranty*, used the gun, which but for the warranty he would not have done; and that the gun, being in the hands of the plaintiff, by reason and wholly in consequence of its weak, dangerous, and insufficient construction and materials, burst and exploded, whereby the plaintiff was greatly wounded, &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost the use of his hand:—*Held*, on error, (after verdict for the plaintiff on the plea of not guilty, and on other pleas denying the warranty and that the gun was unsafe, &c.) that the action was maintainable. *Levy v. Langridge*, 337

AMENDMENT.

See FRAUDS, STATUTE OF, 2.
PRACTICE, IV.

ANNUITY.

Lands were enfeoffed to R. H. and the defendant, to the use, intent, and purpose that the plaintiff, his heirs and assigns for ever, should receive and take out of the lands a yearly rent of 68*l.* payable half-yearly; and the defendant covenanted with the plaintiff that R. H. and the defendant, their executors, &c., or some or one of them, would pay or cause to be paid to the plaintiff, his heirs and assigns, the said yearly rent at the terms appointed for payment thereof:—*Held*, that the plaintiff could not sue the defendant in debt for arrears of the annuity. *Randall v. Rigby*, 130

APPRENTICE.

The justices at sessions have no power, under the stat. 5 Elis. c. 4, s. 35, on making an order for the discharge of an apprentice from his apprenticeship, to direct the return of any part of the premium already paid to the master, or the non-payment of any part of it remaining unpaid. *East v. Peel*, 685

Semble, per *Alderson*, B., that the statute does not apply to cases where a premium is given with the apprentice, but only to compulsory bindings without premium. *Ibid.*

ARBITRATION.**I. Authority of Arbitrator.****(1). To administer Oath to Witnesses.**

A cause was referred at Nisi Prius, by an order of reference which stated "that the witnesses should be examined upon oath, to be taken before me" (the Judge of Assize,) "or some other Judge of the Court of Exche-

quer, or before a commissioner appointed to take affidavits in the same Court:"—*Held*, that this clause did not exclude the general power of the arbitrator to administer an oath to such witnesses, under 3 & 4 Will. 4, c. 42, s. 41. *Hodsoll v. Wise*, 536

II. Award.**(1). When sufficiently final.**

Where an action of debt, in which the defendant had pleaded the general issue and a set-off, was, by consent, referred to arbitration, "the costs of the reference and award to abide the event," and the arbitrators found that the plaintiff was not entitled to recover in the action, and had not any cause of action against the defendant, but said nothing as to the set-off:—*Held*, that the award was final, and that the defendant was entitled to maintain an action for the costs of the reference and award. *Duckworth v. Harrison*, 432

Where, on a reference of a cause to arbitration, the costs to abide the event, the arbitrator finds in favor of the defendant upon a plea which covers the whole cause of action, it is no objection to the award that on other issues the arbitrator has found for the plaintiff without damages. *Savage v. Ashwin*, 830

(2). By Arbitrators without Umpire.

By agreement of reference, a cause was referred to two arbitrators, with power to appoint an umpire, the costs of the cause to abide the event; and the said parties thereby bound themselves to stand to, obey, and keep the award "of the said two arbitrators and their umpire, so as the award of the said arbitrators and their umpire was made before a certain day." An award was made by the two arbitrators only, and they found two issues for the plaintiff and one for the defendant, and directed that "the costs of the

said cause, and of the several issues found therein, shall be paid to the plaintiff, or to the party entitled thereto:"—*Held*, on motion for an attachment, that the validity of the award, being made by the two arbitrators only, was too doubtful to grant an attachment upon it; and 2ndly, that it was void as to the adjudication of the costs of the cause. *Hetherington v. Robinson*, 608

(3). *Setting aside.*

Where an arbitrator, to whom a cause was referred by order of Nisi Prius, directed that the verdict should be entered for the plaintiff for 254*l.*; and then set forth certain facts raising a question for the opinion of the Court, and awarded that if, upon such facts, the Court should be of opinion that the verdict should be for 125*l.* only, then the damages should be reduced to that sum:—*Held*, that a motion to enter the verdict for the latter sum, upon the facts so stated by the arbitrator, was in effect a motion to set aside the award, and must be made within the term next following that in which the award was made. *Anderson v. Fuller*, 470

III. *Second Trial after abortive Reference.*

Where a verdict was taken at Nisi Prius, and entered in the associate's book (but not on the record), subject to a reference, and the time limited for making the award expired before the order of reference was delivered to the arbitrator, when the defendant refused to proceed with the reference; whereupon the plaintiff, without making any application to the Court, took the cause down again to trial, and obtained a second verdict:—*Held*, that the latter trial and verdict were irregular.

Held, also, that the irregularity was not waived by the defendant's attorney

attending and cross-examining a witness, under an order obtained by the plaintiff's attorney (after the other party had refused to go on with the reference) for the examination of the witness on interrogatories, under the 1 Will. 4, c. 22, s. 4. *Hall v. Rouse*, 24

ARREST.

(1). *Privilege from.*

A page of the presence in ordinary to the Queen is privileged from arrest. *Reynolds v. Pocock*, 371

(2). *Under 1 & 2 Vict. c. 110, s. 3.*

The principle by which the Judges will be guided in allowing an arrest under the 1 & 2 Vict. c. 110, s. 3, is to consider whether the defendant is about to leave the country for such a time that he is not likely to be forthcoming to satisfy the plaintiff's execution at the period when he will be entitled to it in the ordinary case of law proceedings.

It was therefore held to be a sufficient ground for issuing the writ, that the defendant, an officer in the army, was about to join his regiment stationed abroad. *Larchin v. Willan*, 351

(3). *Discharge under 1 & 2 Vict. c. 110.*

1. Where a defendant was arrested on mesne process before the 1st October, 1838, and gave a bail-bond; and after that day final judgment was signed against him, and a ca. sa. issued and lodged with the sheriff, in order to fix the bail; the Court refused to exonerate the bail on an equitable construction of the 1 & 2 Vict. c. 110, s. 7. *Jackson v. Cooper*, 353

2. Where a defendant was arrested on mesne process before the 1st October, 1838, and deposited a sum of money in lieu of bail and for costs, which was paid into court, under the 7 & 8 Geo. 4, c. 71, s. 3:—*Held*, that he was not

entitled to have the money paid out to him after the 1st October, on an equitable construction of the 1 & 2 Vict. c. 110, s. 7. *Harrison v. Dickenson*, 355

3. Where a defendant was arrested on mesne process previously to the passing of the statute 1 & 2 Vict. c. 110, but escaped from custody, and was re-taken under an escape-warrant after the act came into operation:—*Held*, that he did not come within the 7th section, as being in custody at the commencement of the act, or within the 1st section, as having been arrested on *mesne process* after the act came into operation, and that he was not entitled to his discharge. *Nyas v. Milton*, 359

4. Where a defendant, who was arrested on mesne process, and gave bail, before the 1st October, 1838, immediately on his discharge went and still remained abroad, the Court refused to enter an exoneretur on the bail-piece. *Lewis v. Ford*, 361

(3). *Discharge from, on ground of Privilege.*

A party privileged from arrest re-deundo was arrested on a writ of capias ad respondendum, and applied for and obtained a Judge's order for his discharge in that action, on the ground of his privilege. At the time of his arrest, other writs of ca. sa. against him were in the hands of the sheriff:—*Held*, that the sheriff was justified in detaining him on those writs, notwithstanding notice of the Judge's order. *Watson v. Carroll*, 592

(4). *Discharge from, on ground of Illegality.*

Where a defendant was arrested under an attachment out of the Court of Chancery for non-payment of costs, and a capias utlagatum out of this Court, at the suit of the same party who was

the plaintiff in the equity suit, was on the same day lodged with the sheriff; and the arrest under the attachment was afterwards set aside by the Court of Chancery, for irregularity:—*Held*, that the defendant was entitled to be discharged as to the capias utlagatum also. *Hall v. Hawkins*, 590

ASSESSED TAXES.

Arrears of assessed taxes cannot be recovered by information in the nature of a popular action of debt, under the statutes 43 Geo. 3, c. 99, s. 45, and 5 & 6 Will. 4, c. 20, s. 13, inasmuch as the latter section provides that the amount "shall be recoverable from the person and persons making default of payment thereof, as a debt upon record to the King's Majesty." The proceedings ought to be by scire facias or extent, or information upon the record itself. *The Attorney-General v. Sewell*, 77

ATTORNEY.

(1). *Changing Attorney.*

Where an attorney has accepted a declaration, and has acted and been treated by the plaintiff as the attorney in the cause, another attorney cannot proceed with the action without a rule for changing the attorney, although the former attorney's name was not upon the record. *May v. Pike*, 197

(2). *Delivery of Bill.*

The Court has a general jurisdiction, independently of the statute 2 Geo. 2. c. 23, s. 23, to order an attorney to deliver a bill of costs to his client, and account for monies received; although they have no power to order it to be taxed, except in the cases provided for by the act. *Clarkson v. Parker*, 532

(3). *Costs of Taxation of Bill.*

An attorney is not compellable to

BAIL.

pay the costs of taxation, on the ground of more than one sixth having been taken off his bill, unless there have been either an undertaking by the party to pay the bill, or money brought into court, with an agreement by the party that it shall be appropriated to that purpose; since otherwise it is not within the stat. 2 Geo. 2, c. 23, s. 23. *Rogers v. Peterson*, 588

BAIL.

See ARREST, (3), 1, 2, 4.

(1). *Affidavit of Justification.*

Where bail justify for property, which, though sufficient in amount, is not properly described in the affidavit of justification, the plaintiff is not entitled to the costs of opposition, but the bail will be admitted without payment of costs, and the costs of the opposition will be costs in the cause. *Brown v. Ahrenfeldt*, 76

(2). *Justification of by Sheriff.*

When a sheriff, eight days after an arrest, is called upon by a Judge's order forthwith to put in and perfect bail, he is bound to justify without notice of exception, such a case not being within the rule of T. T. 1 W. 4, s. 4. *Rex v. Sheriff of Middlesex*, 529

(3). *Staying Proceedings on Bail-bond.*

Where a defendant, on being arrested, gave bail to the sheriff, and subsequently obtained an order to stay proceedings in the action, on payment of debt and costs forthwith, "the plaintiff to be at liberty to sign final judgment, and issue execution for the amount," if the debt and costs were not so paid; and default being made in payment, the plaintiff took an assignment of the bail-bond, and issued process against the bail, after which the defendant died:—*Held*, that the bail were entitled to stay proceedings on the bail-bond on

BILLS AND NOTES. 805.

payment of costs; that the order did not require them to put the plaintiff into a condition to sign judgment, by justifying bail above, and therefore he had not lost a judgment by their laches. *Isaac v. Rickardo*, 382

BANKRUPTCY.

Set-off against Assignees.

To a count for money had and received to the use of assignees of a bankrupt, the defendant pleaded that although the money mentioned remained and was in the possession of the defendant after the bankruptcy, yet that it was in fact received before the issuing of the fiat, and from thence remained in the defendant's possession: that before and at the time of the issuing of the fiat, the bankrupt was indebted to the defendant in a larger sum; and that, at the time he so gave credit to the bankrupt, he had no notice of any act of bankruptcy:—*Held*, that this was not a good ground for a set-off, (which the plea concluded with), and that it was therefore bad. *Wood v. Smith*, 522

BILL OF LADING.

See PRINCIPAL AND FACTOR.

BILLS AND NOTES.

I. *What is a Promissory Note.*

Held, that a paper, whereby the defendants promised to pay the plaintiffs, or order, the sum of 13*l.*, for value received, with interest at 5*l.* per cent., and all fines according to rule, could not be declared on as a promissory note.

The jury having found general damages on a declaration containing a count on the above instrument, (as a promissory note), and a count on an account stated, the Court awarded a venire de novo. *Ayrey v. Fearnside*, 168

II. *Consideration.*

To a declaration in debt on a promissory note for 24*l.*, dated 3rd January, 1837, made by the defendant payable twelve months after date to the plaintiff, the defendant pleaded that one J. W., before and at his death, was indebted to the plaintiff in 24*l.*, for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, after the death of J. W., applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after the death of J. W., for and in respect of the debt so remaining due to the plaintiff as aforesaid, and for no other consideration whatever, made and delivered the note to the plaintiff; and that J. W. died intestate, and that, at the time of the making and delivery of the note, no administration had been granted of his effects, nor was there any executor or executors of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid. Replication, *de injuriâ*:—*Held*, after verdict for the defendant, that the plea was no answer to the declaration, inasmuch as it did not negative every consideration for the promissory note, for that it did not allege that there were no assets; and the effect of the giving of the note was, at all events, to preclude the plaintiff from suing the defendant, in case she should afterwards take out administration, for a year, which was a sufficient consideration for the giving of the note: and therefore that the plaintiff was entitled to judgment *non obstante veredicto*. [Reversed on error: see *Nelson v. Serle*, post, pl. 2]. *Serle v. Waterworth*, 9

2. To a declaration in debt on a promissory note for 24*l.*, dated 3rd January, 1837, made by the defendant, payable twelve months after date to

the plaintiff, the defendant pleaded that one J. W., before and at his death, was indebted to the plaintiff in 24*l.*, for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, after the death of J. W., applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after the death of J. W., for and in respect of the debt so remaining due to the plaintiff as aforesaid, and for no other consideration whatever, made and delivered the note to the plaintiff; that J. W. died intestate, and that, at the time of the making and delivery of the note, no administration had been granted of his effects, nor was there any executor of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid; and the defendant averred *that there never was any consideration for the said note except as aforesaid*. *Held*, that the plea was a good answer to the declaration. *Nelson v. Serle*, (in error), 79

III. *Presentment of Foreign Bill payable after Sight.*

A bill of exchange was drawn in duplicate on the 12th of August, at Carbonear, in Newfoundland, payable 90 days after sight, on S. & Co., in England, for the freight of a voyage from Liverpool to Carbonear. The bill was not presented for acceptance to S. & Co. until the 16th of November. Carbonear is 20 miles from St. John's, with a daily communication between those places; and from St. John's there is a post-office packet three times a week to England, the average voyage being about 18 days:—*Held*, that the jury properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the delay. *Straker v. Graham*, 721

IV. *Actions on—Pleadings.*

In an action by indorsee against acceptor of a bill, (not stated to be payable at any particular place), it is a good defence under a plea that the defendant did not accept the bill declared on, that after he had accepted it generally, it was altered without his knowledge, by the addition of a memorandum making it payable at a banker's. *Calvert v. Baker*, 417

CANAL ACT.

A company were empowered by an act of Parliament to make a canal within certain limits, without specifying any time within which it was to be completed: *Held*, that no limitation as to time could be assigned to the powers conferred, by an intendment that they were to be exercised within a *reasonable time*, and consequently that the works might be resumed at any period.

Quære, whether any and what acts would amount to an abandonment of the powers so conferred? If the capital, which the act empowers the Company to raise, be not raised to the full extent, *quære*, whether that circumstance affects the right of the Company to prosecute the work afterwards?

The act of Parliament gave certain commissioners power to purchase lands, &c., and directed them to make compensation to persons interested therein for all damage sustained:—*Held*, that a party entitled to an easement over lands so purchased by them, could not maintain trespass for acts done upon those lands to the prejudice of his easement, but as soon as any damage was actually sustained, he ought to have claimed compensation under the act. *Thicknesse v. The Lancaster Canal Company*, 472

CARRIER.

See RAILWAY ACT.

COGNOVIT.

(1). *Execution and Attestation of.*

To constitute an express naming of an attorney, within the stat. 1 & 2 Vict. c. 110, s. 9, it is sufficient if the attorney be named by another party, and adopted by the defendant, who calls upon him to request him to attest the execution of the cognovit; and it is not necessary that he should be in the first instance named by the defendant.

The attestation need not state that the attorney was *named by* the defendant; it is sufficient if he therein declares himself to be attorney for the defendant, and states that he subscribes as such.

The cognovit need not be *read over* to the defendant before execution, if he be informed of its nature and effect. *Oliver v. Woodroffe*, 650

(2). *Given by Infant.*

A cognovit was given by a minor, authorizing an attorney to appear for him and confess an action brought against him for a precise sum for necessities provided for him by the plaintiff, with an undertaking "not to bring any writ of error, nor do any act to prevent the plaintiff from entering up judgment or suing out execution:—" *Held* bad on three grounds; 1st, that an infant cannot appoint nor appear by attorney, but only by guardian; 2ndly, that he cannot state an account; 3rdly, that he cannot deprive himself of his right to bring a writ of error, or any other right to which he was entitled. *Ibid.*

(3). *Entering Appearance for Defendant under.*

Where a defendant, more than four months after the issuing of a writ of *capias* against him, gave the plaintiff's attorney a cognovit to enter up judgment:—*Held*, that the attorney was thereby empowered (without any ex-

press authority for that purpose, and notwithstanding the lapse of time), to enter an appearance for the defendant, and to take all other proceedings necessary to obtaining judgment. *Richardson v. Daly*, 384

COMPUTATION OF TIME.

See PLEADING, II, 1.

COSTS.

See ATTORNEY, 3.

ELECTION PETITION.

(1). *Security for.*

When security for costs has been given by a plaintiff residing out of the jurisdiction, the Court will not order the bond to be delivered up to be cancelled before the end of the suit, on the alleged ground that the plaintiff has since returned to England, with the intention of permanently remaining. *Badnall v. Haylay*, 535

(2). *Of Pauper.*

When a plaintiff, suing in formâ pauperis, succeeds upon one of several issues, the defendant is not entitled to any set-off in respect of the costs of other issues found for him. *Foss v. Racine*, 610

(3). *In Trespass.*

To trespass qu. cl. fr., and carrying away divers large quantities of straw, the defendant pleaded, 1st, not guilty; 2ndly, that the straw was not the property of the plaintiff; 3rdly, a justification to the whole cause of action: to which last plea the plaintiff demurred, but judgment was given on the demurrer for the defendant. At the trial, the jury found a verdict for the plaintiff on the 1st issue, with 1s. damages, and for the defendant on the 2nd, and the Judge did not certify under the 22 & 28 Car. 2, c. 139:—*Held*, that the plaintiff was entitled to no more costs

than damages. *Patrick v. Colerick*, 527

(4). *On several Issues.*

Where some issues are found for the plaintiff, and some for the defendant, the latter will be entitled to the costs of the witnesses who are called exclusively in support of the issues found for him, but not of those who are also examined to disprove the issues found for the plaintiff.—*Crowther v. Elwell*, 71

(5). *Of the Day.*

Where a cause is taken down to trial by both parties, and the plaintiff withdraws his record, the defendant is entitled to costs of the day, although he might have proceeded to try the cause upon his own entry of it by proviso. But he is not so entitled when, by consent of both parties, the cause was made a remanet. *Blow v. Wyatt*, 407

(6). *On new Trial granted.*

The plaintiff in an action of trespass for mesne profits, having been nonsuited at the trial, obtained a rule for a new trial, which was silent as to costs. The plaintiff drew up and served the rule. Another action was afterwards commenced against the defendant in the name of John Doe, for the recovery of the same mesne profits; whereupon the defendant obtained a rule for staying the proceedings therein, until the plaintiff should discontinue the former action. The plaintiff's attorney gave notice of trial in the action in which a new trial was ordered, but afterwards countermanded it; and the defendant's attorney also gave notice of trial by proviso, which also was countermanded. After the Assizes, the plaintiff discontinued:—*Held*, that the defendant was not entitled to the costs of the trial. *Sir W. H. Jolliffe, Bart., v. Mundy*, 502

DEED.

(7). *Of abortive Reference.*

Where a cause was referred before trial, and an arbitration bond entered into, but which could not be made a rule of Court, and the reference proving abortive, the cause was afterwards tried:—*Held*, that the successful party was not entitled to the costs of the abortive reference as costs in the cause. *Doe d. Davies v. Morgan*, 171

(8). *Taxation, Notice of.*

Notice of taxation given before 9 o'clock P. M. of one day for the day following at 12, is "one day's notice," within the meaning of the rule of T. T. 1 Will. 4, s. 12. *Edmunds v. Cates*, 66

(9). *By whom payable.*

This Court will not interfere to make a person who is not a party to the record pay the costs of the action, though he is the real party interested in the event of it. *Hayward v. Giffard*, 194

(10). *By whom to be demanded.*

Where a trial was postponed by reason of the absence of a material witness, on payment of the costs of the day by the defendants "to the plaintiff":—*Held*, that a demand of such costs by the plaintiff's attorney in the cause, was sufficient whereon to ground an attachment for their non-payment. *Inman v. Hill*, 7

DEBT.

See ANNUITY.

DECREE IN EQUITY.

See DEPUTY DAY METERS OF LONDON.

DEED.

Profert of.

When the profert of a deed is requisite, it is not sufficient to allege as an excuse, that the deed was delivered to

DEPUTY DAY METERS. 309

the opposite party. *Wallis v. Harrison*, 538

DEPOSIT MONEY.

See VENDOR AND PURCHASER, II.

DEPUTY DAY METERS OF LONDON.

The deputy day meters of the city of London are entitled, by immemorial custom, to the exclusive right, by themselves and their servants, of measuring, shovelling, unloading, and delivering all oysters brought in any boat or vessel for sale along the river Thames to any place within the limits of the port of London, and to receive a reasonable compensation for so doing; and a jury found that 8s. for every score for the first 100 bushels, and 4s. for every score of bushels of the remainder of a cargo, was a reasonable recompense to them for the labour of shovelling, unloading, and delivering out the oysters, exclusive of the sums paid to the corporation of London for metage under the statute 11 Will. 3, c. 24, s. 7.

The meters are not therefore bound to perform in their own persons the manual labour of shovelling, &c., but are bound to provide sufficient men for the purpose, and are liable to an action in default of their doing so.

On an issue as to the existence of such immemorial right of the deputy day meters:—*Held*, that a decree of a Court of Equity, in a cause between third parties, touching the same right, whereby an issue was directed to try whether the above sums were a reasonable recompense, was admissible in evidence.—*Held*, also, that the party producing it was not bound also to put in the depositions in the cause, which were referred to (in the usual form) in the decree; but *semble*, that the other party would be entitled to read the depositions as *his* evidence.

Where a document has been put in by one of the parties in a cause, and portions of it have been read at the instance of the opposite counsel, he is then too late to object to its admissibility. *Laybourn v. Crisp*, 320

DEVISE.

(1). *Designation of Devisees.*

A testatrix devised lands (after the death of devisees for life) to the *second son* of J. K. in fee. At the time of making the will, J. K. had had three sons, but two of them had died previously. Afterwards, and in the testatrix's lifetime, J. K. had a son, H., (who died in her lifetime), and another son, John, who survived her :—*Held*, that John took under the devise. *King v. Bennett*, 36

(2). *Issue, when a Word of Purchase.*

A testator, by the residuary clause of his will, devised as follows :—“ I give, devise, and bequeath all the rest of my freehold, copyhold, and leasehold estates, and all other my real and personal estate, according to the nature and quality of such estates respectively, unto my wife E. M. for her own use during her natural life, and, after her decease, unto my said son and daughters, and their *lawful issue* respectively, in tail general, with benefit of survivorship to and amongst their issue respectively as tenants in common, and not as joint tenants; provided, that such issue not to have a vested interest until they attain the age of twenty-one, being sons, and, being daughters, until they attain that age or are married; but during the minority of the said issue of my said son and daughters, I authorize my trustees, or the survivor of them, or his heirs, after the death of my said son and daughters respectively, to apply the whole or any part of the rents and profits of the said estates, and not ex-

ceeding the interest of the presumptive share of such child therein, for and towards his, her, or their maintenance, education, and advancement during minority; and in case my said son and daughters, or any of them, shall die in my lifetime, or after my decease, without leaving lawful issue, or with lawful issue which, being a son or sons, shall not attain the age of twenty-one, or, being a daughter or daughters, shall not attain that age or be married, then the share or shares of him, her, or them so dying to be for the benefit of the survivors and their issue, in the same manner as their original shares are hereinbefore given to them respectively.” In previous clauses of the will, the testator had created trusts of different sums of money for the benefit of his son and daughters and their issue; and it was admitted that in those clauses the word “ issue ” was used to describe their children :—*Held*, that in the residuary clause also, the words “ lawful issue ” were to be construed as words of purchase, and not of limitation, and as designating the children of the testator's son and daughters; and that the son and daughters took estates for life in the freehold property thereby devised, with contingent remainders in tail to their respective children, with cross remainders in tail amongst such children respectively, and cross limitations over amongst the children of the respective families. *Curs- ham v. Newland*, 101

(3). *In joint Tenancy or Tenancy in common.*

A testator by his will devised his real estates to his nieces, E. G. and J. P., *equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever* :—*Held*, that they took estates as joint tenants for life, with several inheritances on the death of the survivor. *Doe d. Littlewood v. Green*, 229

(4). *To Trustees.*

A testator devised lands to his wife E. B., his daughter A. W., and W. B. W., her husband, and their heirs, to hold to them and their heirs, on trust, to permit and suffer his said wife E. B. to receive and take all the *net* rents and profits during her life to her own use, subject to a rent-charge of 100*l.*, payable to his said daughter A. W. under her marriage settlement; and from and after the decease of his said wife, upon further trust to permit and suffer the said A. W. to receive and take all the net rents and profits to her sole and separate use for life, independent of her husband; and from and after her decease, upon further trust, to permit and suffer the said W. B. W. to receive and take all the net rents and profits to his own use for his life; with remainder to their children in tail. A power of sale was given to the trustees, which required the purchase-money to be invested in the funds in their names: and after the decease of the wife, a power of appointment of new trustees was given to A. W. and W. B. W., or the survivor of them:—*Held*, that the trustees took the legal estate immediately on the death of the testator. *Barker v. Greenwood*, 421

(5). *Construction of inconsistent Devises.*

A testator devised his two houses and gardens to his wife during her widowhood; and after the determination of that estate, to the use of all and every of his child or children by his said wife, equally to be divided between them, share and share alike, and the lawful issue of their or her or his bodies or body; and for default of such issue, to the use of his nephew in fee. By a subsequent clause, he devised and bequeathed to his daughter F. the sum of 300*l.*, to be paid when she attained 21, and the house wherein she then

lived [one of those before devised], after her mother's decease or marriage; and to his daughter R. the sum of 300*l.*, to be paid when she attained 21, and the house in the occupation of D. [the other of those before devised], after her mother's decease or marriage; and in case of either of his daughters dying without lawful issue before the said sum or sums were paid, then the share or shares of her or them so dying to be divided amongst the survivors or survivor of them.

The testator had no other property but the two houses, and no children except the two daughters, who both survived him and his wife. F. married, had a child which died, and died, leaving her husband, and also her sister F., surviving her:—*Held*, that, on the construction of the whole will, an estate for life was given (subject to the devise to the widow) to each daughter in severalty in one house, with remainder in both to the testator's children as tenants in common in tail; and therefore that R. was entitled, on F.'s death, to recover a moiety of the house devised to F.

Seem, that F.'s husband was entitled to the other moiety thereof as tenant by the curtesy, F.'s estate for life therein having merged in her estate tail. *Doe d. Amlot v. Davies*, 599

DWELLING HOUSE.

See TRESPASS.

EASEMENT.

See PRESCRIPTION ACT.

A parol license from A. to B. to enjoy an easement over A.'s land, is countermandable at any time whilst it remains executory; and if A. conveys the land to another, the license is determined at once, without notice to B. of the transfer, and B. is liable in trespass if he afterwards enters upon the land. *Wallis v. Harrison*, 538

EJECTMENT.

(1). *Under 1 Geo. 4, c. 87.*

A notice under the 1 Geo. 4, c. 87, s. 1, requiring the tenant, "according to the statute, to appear in Court in Trinity Term next following," &c., is bad: it ought to require his appearance on the first day of the term. *Doe d. Holder v. Rushworth*, 74

Quære, whether a rule can be had under that statute, where the lease or agreement is unstamped at the time the motion is made? *Ibid.*

(2). *Affidavit of Service.*

An affidavit of service of a declaration in ejectment, where the declaration is on several demises, is wrongly entitled "Doe on the demise of C. v. Roe," without mentioning the others. *Doe d. Cousins v. Roe*, 68

(3). *Right of Defendant to dispute Lessor's Title.*

Ejectment for two stamping mills, on the demise of C. H. The mills had been let to a mining company by C. H. from year to year, and notice to quit had been given by him to the company. On the day of the demise in the declaration C. H. was a partner in the company, and the defendant, who was another partner, defended on behalf of the company. At the trial, it was ruled that the defendant was estopped from disputing the title of C. H., although C. H. had admitted in an answer in Chancery, which was in evidence, that he had no legal title:—*Held*, on a bill of exceptions, first, that the defendant was estopped from disputing C. H.'s title, notwithstanding C. H. was a partner with him in the company; and secondly, that C. H. being a member of the company was no objection to an ejectment brought on a demise by him. *Francis v. Harvey*, 331

ELECTION PETITION.

Costs of.

Where a petition is presented to the House of Commons against the return of a member, and at the day appointed for taking the petition into consideration, the petitioner fails to appear, and the order for taking it into consideration is discharged, the Speaker has power, under the 9 Geo. 4, c. 22, s. 60, to cause the costs of the sitting member to be taxed; and if the amount be not paid within six months after demand, he has power, by section 65, to certify the recognizances entered into by the petitioner and his sureties into the Exchequer, and that default has been made in payment; upon which the recognizances are to have the same effect as if estreated in a court of law. *In re Scott*, 257

ESCAPE.

A debtor in custody of the sheriff on mesne process was taken, after the writ was returnable, from the county gaol, in the gaoler's custody, to a place in the same county several miles distant, in order to give evidence before a revising barrister, and was returned into the gaol the same day:—*Held*, that this was an escape. *Williams v. Mostyn*, 145

No action can be maintained against the sheriff for the escape of a prisoner in custody on mesne process, unless the plaintiff have sustained actual damage or delay of his suit thereby. *Ibid.*

EVIDENCE.

See DEPUTY DAY METERS OF LONDON.

WITNESS, I.

(1). *Secondary Evidence.*

The defendant gave a verbal warranty of a horse, which the plaintiff

thereupon bought and paid for, and the defendant then gave him the following memorandum:—"Bought of G. P. a horse for the sum of 7*l.* 2*s.* 6*d.*—G. P."—*Held*, that parol evidence might, notwithstanding, be given of the warranty. *Allen v. Pink*, 140

(2). *Declarations of Insolvent.*

Declarations of a person in insolvent circumstances, tending to shew that he knew of his insolvency, are admissible in evidence to prove such knowledge, provided the fact of his insolvency be proved aliunde. *Thomas v. Connell*, 267

Semble, that the fact of insolvency should be proved before the declarations are offered in evidence. *Ibid.*

(3). *Of Date of Document.*

A written paper, containing a statement of mutual accounts between a creditor and a bankrupt, by whom it was signed, and bearing date previous to the bankruptcy, shewing a balance due to the creditor, is *prima facie* evidence, as against the assignees, in an action brought by them against the creditor, that it was written at the time it bore date. *Sinclair v. Baggaley*, 312

Semble, that such a document is evidence of *payment*, and not of a set-off, and ought to be pleaded as such. *Ibid.*

EXECUTOR AND ADMINISTRATOR.

(1). *Liability as Executor de son tort.*

1. The widow of a hair-dresser, who died in October, 1836, continued to reside in house and keep open the shop, (through which was the entrance to the house), but there was no proof of any articles being sold. In December, she received notice of a bond debt of 100*l.* due from him, and had his goods valued. In January, 1837,

on the application of a creditor to whom he owed 24*l.* for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date. In March, she took out administration:—*Held*, in an action against her on the promissory note, that this was not evidence to charge her as executrix *de son tort*. *Serle v. Waterworth*, 9

2. Where a party receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort*, unless he receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased: which is a question for the jury. *Camden v. Fletcher*, 378

FIXTURES.

See MORTGAGOR AND MORTGAGEE.

FRAUDS, STATUTE OF.

(1). *Acceptance of Goods.*

In *assumpsit* for a mare sold and delivered, to which the defendant, pleaded non *assumpsit*, it appeared that the defendant, having seen and ridden the mare, wrote to the plaintiff: "I will take the mare at 20 guineas, of course warranted; and as she lays out, turn her out my mare." The plaintiff agreed to sell her for the 20 guineas. The defendant subsequently wrote again to him:—"My son will be at the World's End (a public house) on Monday, when he will take the mare and pay you: send any body with a receipt, and the money shall be paid; only say in the receipt, *sound and quiet in harness*." The plaintiff wrote in reply, "She is warranted sound, and quiet in double harness; I never put her in single harness." The mare was brought to the World's End on the Monday, and the defendant's son took her away without paying the price, and without any

receipt or warranty. The defendant kept her two days, and then returned her as being unsound. The learned Judge stated to the jury that the question was whether the defendant had accepted the mare, and directed them to find for the defendant if they thought he had returned her within a reasonable time; and desired them also to say whether the son had authority to take her without the warranty. The jury found that the defendant did not accept the mare, and the son had not authority to take her away:—*Held*, on motion to enter a verdict for the plaintiff, that there was no complete contract in writing between the parties; that, therefore, the direction of the learned Judge was right; that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent; and consequently that the plaintiff was not entitled to recover. *Jordan v. Norton*,

155

(2). *Sale of Interest in Land.*

The defendant, in the month of June, agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2s. per sack, the plaintiff to have them at digging up time, (October), and to find diggers:—*Held*, that this was not a contract for the sale of an interest in land, within the 4th section of the Statute of Frauds.

The declaration, as originally framed, stated the contract to be to deliver the potatoes *within a reasonable time*, to be paid for on delivery. The pleas were non assumpsit, and that the contract had been rescinded by consent, on which latter plea there was conflicting evidence. The Judge at Nisi Prius having, on the application of the plaintiff, directed the declaration to be amended so as to make it conformable with the contract as above stated, the

Court refused a new trial, no affidavit being produced to shew that the defendant had been prejudiced by the amendment. *Sainsbury v. Matthews*,

343

GRAVESEND PIER ACT.

By the Gravesend Pier Act, (3 & 4 Will. 3, c. 101, s. 18), the corporation are empowered to appoint clerks, treasurers, collectors, and such other officers or assistants as they may think necessary for the purposes of the act. By sect. 19, it is provided that it shall not be lawful for the corporation to appoint the person who may be appointed the clerk in the execution of the act, the treasurer for the purposes of the act; and a penalty is imposed on any person, being the clerk, or his partner or clerk, who shall in any manner officiate for the treasurer:—*Held*, that, by the latter section, the corporation were prohibited from appointing the clerk to such officer as assistant treasurer; but where the corporation had so appointed the clerk, and he had discharged some of the duties of the treasurer, *held*, that it was a question for the jury, whether he did so bona fide and in the belief that he was legally appointed by them as an independent officer, or colourably and in evasion of the act; and that, in the former case, he would not be liable to the penalty for officiating for the treasurer, but in the latter he would. *Hawkings v. Newman*,

613

GUARANTEE.

See PRINCIPAL AND SURETY, 2.

HUSBAND AND WIFE.

Damages for Slander of Wife.

In case by husband and wife for slanderous words, actionable in themselves, spoken of the wife, they cannot recover for special damage by the loss

of service by the wife. *Dengate v. Gardiner*, 5

ILLEGAL CONTRACT.

See LIEN.

Declaration in assumpsit stated that J. D. was indebted to the plaintiff in 280*l.*, and the plaintiff had commenced an action against him to recover it, which was pending; and that, in consideration that the plaintiff would accept and receive from J. D. 30*l.* in cash, and ten promissory notes for 25*l.* each, payable at different dates, on account of the said sum of 280*l.*, in discharge of the action, and would forbear and give day of payment to J. D. until the notes should respectively become due, the defendant promised the plaintiff that if any of them should be returned dishonoured, and should remain unpaid for three days, and if the plaintiff should thereupon issue a ca. sa. against J. D., the defendant would surrender J. D. into the custody of the sheriff, &c., so that he might be arrested on such ca. sa.; and in default of so doing, he, the defendant, would pay the plaintiff the amount of any of the said promissory notes, as they should become due:—*Held*, on demurrer, that the agreement was not necessarily illegal, since it must be assumed that the defendant would obtain the arrest of J. D. by lawful means, as by his consent, or for a debt due to himself. *Lewis v. Davison*, 654

INFANT.

See COGNOVIT, 2.

(1). *Power to contract for Necessaries.*

Assumpsit to recover the amount of a tailor's bill, for clothes supplied to the defendants' testator in his lifetime. Plea, infancy of the testator. Replication, necessaries; on which issue was joined. On the trial, it appeared that

the testator was a minor at the time when the goods were supplied, but it was proved that he had an allowance of 500*l.* a year, besides his pay as a captain in the army. The learned Judge at the trial was of opinion that if the minor had a sufficient income allowed him to supply him with necessaries suitable to his condition for ready money, he could not contract even for necessaries upon credit:—*Held*, that this was a misdirection. *Burghart v. Hall*, 727

INSOLVENT.

See EVIDENCE, 2.

(1). *Voluntary Transfer by.*

1. Where a conveyance or transfer of goods is made by a party in insolvent circumstances to a creditor, in pursuance of a bonâ fide demand by the creditor, it is not voluntary within the meaning of the 7 Geo. 4, c. 57, s. 32: it is not necessary, in order to support it, that there should have been pressure on the part of the creditor, or an apprehension on the part of the insolvent that by not making it he should be in a worse condition. *Mogg v. Baker*, 348

2. Where a person in insolvent circumstances, being pressed by particular creditors, employed an attorney to endeavour to effect an arrangement with all his creditors, but that failing, the attorney advised that his goods should be sold by auction, and that he should go through the Insolvent Debtors' Court, in order that his effects might be rateably divided amongst his creditors; and the goods were sold accordingly, and the proceeds were, with the insolvent's assent, paid over by the auctioneer to the attorney, who (after making several payments to and on account of the insolvent) retained against the assignees the whole amount of his bill for the business done for the insolvent:—*Held*, that this was not a

voluntary transfer or delivery of that sum by the insolvent to the attorney, within the 7 G. 4, c. 57, s. 32, there being no proof that it was intended that he should hold the proceeds for his own benefit, or for the benefit of any particular creditors, or otherwise than as the agent of the insolvent. *Wainwright v. Clement*, 385

(2.) *When Supersedeable.*

Where an insolvent debtor was discharged, except as to two of the creditors named in his schedule, but it was ordered that as to those two debts, he should not be discharged until he had been in custody for 16 months; and one of these creditors (who had not previously commenced any action against him) immediately on his discharge lodged a detainer against him:—*Held*, that the case was within the 15th section of the Insolvent Act, 7 Geo. 4, c. 57, and therefore that the defendant was not supersedeable on the ground of the plaintiff's not proceeding to declare within two terms. 368

Quære, whether the plaintiff was bound to proceed further in the action at all. *Buzzard v. Bousfield*, *Ibid.*

INSURANCE.

In an action on a policy of insurance on ship, effected by D. & Co., brokers in London, as agents for the plaintiffs, who were merchants in Liverpool, the defendant pleaded, that after the loss had accrued, D. & Co., by and with the authority and assent of the plaintiffs, settled and adjusted with the defendant the amount of the loss, according to the usage and custom of merchants in that behalf, at 97l. per cent., of which the plaintiffs had notice, and assented to and acquiesced in the said adjustment; that D. & Co., at the time of the payment and satisfaction of the loss as after mentioned, were indebted to the defendant in an amount exceeding the said sum of 97l.; and thereupon the

defendant, by and with the privity, knowledge, and consent of the plaintiffs, paid and satisfied the said sum of 97l., by giving credit to D. & Co. for that amount in their account with him; and the defendant then wholly discharged D. & Co. from all claims in respect of that sum in his said account with them; which payment and satisfaction D. & Co. had full authority from the plaintiffs to accept from the defendant on their behalf, as and for payment and satisfaction by the defendant; and the plaintiffs then accepted such settlement and payment in full satisfaction and discharge of the cause of action as to the said sum of 97l.

It appeared in evidence that the plaintiffs had for several years effected insurances in London through D. & Co., and had had general and insurance accounts current with them. The policy in question was effected in September, 1835; the loss appeared on Lloyd's books in May, 1836. D. & Co. were then indebted to the defendant to the amount of 217l. on their underwriting account of the previous year. In June, 1836, they agreed this account with the defendant, and paid him 100l., leaving the remainder on the account to meet the loss in question. In September, it was adjusted by the defendant and all the other underwriters, except two, at 97l. per cent. A memorandum was written on the policy, stating the loss to be payable in one month, and the defendant's subscription was struck through; and the loss was then passed into the accounts between D. & Co. and the defendant. In November, the loss being then about to be adjusted by the other two underwriters, D. & Co. advised the plaintiffs thereof, and the plaintiffs drew bills on them for the amount of the loss. On the 19th November, D. & Co. inclosed them a credit note of the settlement of the whole loss, and carried the amount

of it to the credit of their insurance account with the plaintiffs, of which they sent them an extract; and they debited the plaintiffs with premiums to the end of September, leaving a balance due to the plaintiffs, which they transferred to the credit of the general account. At the foot of the credit note was written, "Above is the credit note of the loss per Vrow Elizabeth, 1155*l.* 3*s.* 10*d.*, but without our prejudice until in cash from the underwriters." The usage at Lloyd's was proved by several insurance brokers to be to settle losses, as between the broker and the underwriter, in the manner above stated, and some of them stated that the usage was well known in Liverpool:—*Held*, that there was sufficient evidence of a custom between the brokers and underwriters to make settlements in accounts by taking credits as payments, and of such a settlement having been made in the present case, and also of the plaintiffs having authorized the brokers to make such settlement, as in substance to prove the plea, and to discharge the underwriters.

Held, also, that the memorandum at the foot of the credit note did not necessarily import that the brokers were to receive payment in cash from the underwriters. *Stewart v. Aberdeen*, 211

INTEREST.

See WRIT OF ERROR.

INTEREST IN LAND.

See FRAUDS, STAT. OF, 2.

JOINT STOCK COMPANY.

Execution against nominal Defendant.

Under the powers given by certain acts of Parliament, a Director of the West Cork Mining Company was sued, and judgment recovered, in an

action on a contract for work and labour, &c., done for the Company:—*Held*, that the Court had no power to order execution to issue against him, the statutes in question not making such a director personally liable. *Harrison v. Timmins*, 510

JOINT TENANCY.

See DEVISE, 3.

JURY.

Affidavit of Juror.

On a motion for a new trial, the Court will not receive an affidavit by the attorney of an admission made to him by one of the jurymen, that the verdict was decided by lot. *Straker v. Graham*, 721

LANDLORD AND TENANT.

See EJECTMENT, 3.

PLEADING, II. (6).

LAND-TAX.

Where a party has been returned in the schedule of the collector of land-tax for a particular parish, under the 48 Geo. 3, c. 141, as in default for a sum assessed upon him for land-tax in that parish, and the schedule having been duly certified to this Court, a writ of *levari facias* has issued, under which such sum has been levied on his goods, and paid into the receipt of the Exchequer, the Court cannot afterwards set aside the writ, on the ground that the party has been assessed in the wrong parish. *In the matter of the Glatton Land-Tax*, 570

LEASE.

Whether Lease or Agreement.—Lease to Parish Officers.

By a written instrument, stamped with a lease stamp, and dated the 25th of February, 1782, E. S., being seised

in fee of a house and premises, agreed to demise and let them to a committee for the parish of H., and the committee agreed to accept and take them, for the purpose of converting them into a poor-house for the use of the parish of H.; to hold to the said committee, in trust as aforesaid, from the *25th day of March* then next coming for the term of ninety-nine years, at the clear yearly rent of 27*l.*, payable half-yearly: and the committee agreed to pay the rent, and to keep the premises in good and sufficient repair during the term. It was also agreed that a lease and counterpart of the premises should be prepared and executed on or before the *first of January* then next, with covenants and agreements pursuant to that contract, and such other general clauses as are usually contained in leases: and there was a proviso, that in case the committee or their successors should think it a more eligible plan to purchase the premises in fee, at the price of 420*l.*, that then he the lessor should convey them accordingly. No lease was ever executed, but the premises, from the date of the instrument, were used as a poor-house for the parish of H., and the churchwardens and overseers for the time being of that parish paid the rent to E. S. and his representatives. In an action of assumpsit against the parish officers for the time being of the parish of H., for non-repair of the premises:—*Held*, first, that the agreement operated as a demise for the term of ninety-nine years, and not as a mere agreement for a lease; secondly, that the lease vested in the overseers of the poor by force of the stat. 59 Geo. 3, c. 12, s. 17, and that the defendants were liable. *Alderman v. Neate*, 704

LIBEL.

(1). *Pleadings*.

1. The plaintiff declared against the

proprietor of a newspaper for libels contained in successive numbers of the paper, referring to the same subject-matter, and to each other. The declaration stated in the commencement, the occasion on which the first libel was published, and set it out: it then proceeded: "And the defendant, afterwards, to wit, on &c., further contriving and intending as aforesaid, in a certain other number of the said newspaper called &c., published of and concerning the plaintiff &c., a certain other false &c. libel, that is to say," (setting it out). Two other subsequent libellous paragraphs were afterwards introduced and set out in the same manner:—*Held*, that each of these statements was a separate count.

One of the paragraphs was as follows:—"We again assert the cases formerly put by us on record: we *assert them against* A. S. and A. H. (the plaintiff). We again assert they are such as no gentleman or honest man would resort to:"—*Held*, that these words imported a charge of misconduct against the plaintiff, not merely an assertion in contradiction of him, and therefore were actionable without the aid of any extrinsic averment. *Hughes v. Rees*, 204

2. Declaration in libel stated that the plaintiff was an attorney, and that certain orders had been made by the Court of Queen's Bench, for setting aside proceedings with costs, in an action in which the plaintiff was the attorney of the then defendant, and the defendant was the attorney of the then plaintiff, and that the costs had been ascertained and taxed by one of the Masters; that *sharp practice* in the profession of an attorney is, and is considered to be, disreputable practice, and discreditable to the attorney adopting it; yet that the defendant, intending to cause it to be believed that the plaintiff had been guilty of such sharp practice as aforesaid in the said action,

and had been reprimanded for it by the Master, published of him the following false, *ironical*, and libellous matter:—“An Honest Lawyer” (thereby meaning the plaintiff, and meaning to represent that he was not an honest lawyer)—“A person of the name of C. B., &c., was severely reprimanded the other day by one of the Masters of the Queen’s Bench for what is called sharp practice in his profession” (meaning and alluding to the plaintiff’s practice with respect to the said orders, and that such practice was sharp practice as aforesaid):—*Held*, that that part of the statement which imputed to the plaintiff sharp practice, was sufficiently explained by the introductory matter to shew that it was libellous.

Semble, also, that the allegation that the libel was *ironical* was sufficient, coupled with the innuendo, to shew that the phrase “an honest lawyer” was used in a libellous sense. *Boydell v. Jones*, 446

LIEN.

S. sent a mare to M., a farmer, to be covered by a stallion belonging to him. The mare was taken to M.’s stables and covered accordingly, upon a Sunday. The charge for covering not being paid, M. detained the mare. A demand of her was afterwards made, but M. refused to deliver her, claiming a lien not only for the charge on that occasion, but for a general balance due to him on another account:—*Held*, first, that M. was entitled to a specific lien on the mare for the charge for covering her:

Secondly, that the claim made by M. to retain the mare for the general balance was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum:

Thirdly, that such a contract was not void within 29 Car. 2, c. 7, s. 1, on the ground of its having been made

and executed on a Sunday, it not being made by M. in the exercise of his ordinary calling; but that even if it were, the contract having been executed, the lien attached. *Scarfe v. Morgan*, 270

LIMITATIONS, STATUTE OF.

(1). *When it runs.*

It is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had began to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted. *Rhodes v. Smethurst*, 42

(2) *Construction of 9 Geo. 4, c. 14, s. 8.*

A promissory note, improperly stamped, is not admissible as a memorandum to take the case out of the Statute of Limitations, under the 9 Geo. 4, c. 14, s. 8. That section applies only to instruments which might be stamped with an agreement stamp.

A mere parol statement of an antecedent debt, without any new contract or consideration, made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the Statute of Limitations. *Jones v. Ryder*, 32

MONEY HAD AND RECEIVED.

For money paid under Misrepresentation.

The defendant supplied the plaintiff with goods to the amount of 71*l.*; the plaintiff authorized M. to pay the defendant that sum. M. paid the defendant 50*l.*, and applied the remaining 21*l.* to his own use. M. also owed the defendant 24*l.*; and the

defendant drew on him a bill for 45*l.*, the amount of these two sums, which he accepted, but which was dishonoured when due, and M. subsequently became bankrupt. The defendant applied to the plaintiff for payment of the amount of the bill, representing that it had all been left unpaid on the plaintiff's account by M.; and the plaintiff, on such representation, paid the 45*l.*, and took possession of the bill. In an action to recover back the balance of 24*l.*, as having been paid under a misrepresentation of the facts:—*Held*, that the plaintiff was not bound to prove that, before action brought, he tendered back the bill to the defendant.
Pope v. Wray, 451

MORTGAGOR AND MORTGAGEE.

Title of Mortgagee to Fixtures.

Where a lessee for years mortgaged his lease, and all his estate and interest in the premises, and afterwards became bankrupt:—*Held*, that the mortgagee might declare in case as reversioner against the assignee of the tenant, for the removal of fixtures from the premises, whereby they were dilapidated and injured; and that he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before the execution of the mortgage, although there was a covenant in the original lease to the mortgagor, to yield up to the lessor, at the determination of the term, "all fixtures and things to the premises belonging *or to belong*."
Hitchman v. Walton, 409

MUNICIPAL CORPORATION ACT.

Reservation of Rights of Burgesses.

Declaration in debt against the corporation of S. stated, that in the year

1762 an act of Parliament passed for dividing and inclosing two pieces of open land in the borough, over which the corporation had immemorially exercised the sole right of pasturage, and enacted that they should be divided between and allotted to the lord of the manor and the corporation in certain shares, and that the corporation should have power, from time to time, to make leases of the allotments so vested in them, for such terms, and with such covenants and agreements, as the burgesses in common hall assembled should think proper. The declaration then set forth a "rule, order, and ordinance" of the burgesses in common hall assembled, made on the 1st of April, 1762; whereby, after reciting that they were of opinion that the most beneficial mode for the corporation of inclosing the lands would be to grant leases of them for long terms to such burgesses as were willing to take the same, under covenants to inclose them, it was ordered, that no lease should be made to one burgess in the same lease of more than fifty or less than five acres; and "it being their desire and opinion that every burgess residing within the borough should receive a benefit from the said inclosure," it was further ordered, that certain annual sums out of the rents arising from the inclosure should be paid and distributed yearly, by the common attornies of the borough for the time being, on every 2nd of November, among the twelve senior burgesses residing within the borough; and that no burgess who should take a lease should be entitled to receive any of such money. The declaration then stated the granting of the leases; that the plaintiff, after the passing of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, viz. for a year ending 2nd of November, 1836, was one of the twelve senior burgesses; that the defendants had received from the rents of the land sufficient to satisfy

the sums so ordered to be paid; and that the office of common attorney was abolished by that statute.

Plea, that on the 2nd of November, 1836, the defendants necessarily, and as they were legally required and bound to do, paid and applied all the rents of the said lands, together with and amongst other rents and sums of money, in payment of certain lawful debts then due and owing to divers persons from the defendants, in their corporate capacity, out of the property of the borough, and by law then payable in priority and preference to the payments to the twelve senior burgesses, or any of them.

Replication, that on the 2nd of November, 1836, a surplus annual income from the said rents, and from other property of the borough belonging to the defendants in their corporate capacity, remained to the defendants, wherewith to pay the annual sums before mentioned, after payment of the interest of all lawful debts chargeable on the land so allotted as aforesaid, together with the salaries of municipal officers, and all other lawful expenses which, on the 5th of June, 1835, were chargeable on the same.

Held, 1st, that the declaration was good; for,

(1.) That the ordinance of 1762 was a valid bye-law;

(2.) That an action of debt was maintainable on it at common law, by the parties to whom pecuniary benefits were granted by it;

(3.) That under the 5 & 6 Will. 4, c. 76, s. 2, such action was maintainable against the corporation at large.

Held, also, that the plea was bad on general demurrer, as not shewing that there existed no surplus rents for the purpose of making the payments to the burgesses, after payment of the interest of debts chargeable on the particular lands.

Semble, that the plea was bad also,

VOL. IV.

as not shewing with sufficient distinctness that the debts, in respect of which the rents had been applied, existed at the time of the passing of the statute 5 & 6 Will. 4, c. 76. *Hopkins v. The Mayor of Swansea*, 621

NEW ASSIGNMENT.

See PLEADING, II. 4.

NOTICE OF ACTION.

See RAILWAY ACT.

OVERSEERS.

See LEASE.

PARTNERSHIP.

A retired partner may give authority by parol to a continuing partner to indorse bills in the partnership name, after the dissolution of the partnership.

And where the retired partner stated that he left the assets and securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name:—*Held*, that the jury were justified in finding that the continuing partner had authority to indorse promissory notes, so left in his hands, in the partnership name. *Smith v. Winter*, 454

PAUPER.

See Costs, 2.

Semble, that the admission of a party to sue in formâ pauperis, after the commencement of the suit, is improper, such admission being in contravention of the stat. 23 Hen. 8, c. 15, s. 2. *Foss v. Racine*,

PLEADING.

See ANNUITY.

BANKRUPTCY.

BILLS AND NOTES, II, IV.

LIBEL.

MUNICIPAL CORPORATION ACT.

III

M. W.

TRESPASS.
VENIRE DE NOVO.
WITNESS, 2.

I. Declaration.

(1). *Account stated, Allegation of Time in.*

A declaration in debt stated that the defendant on a certain day was indebted to the plaintiff in 50*l.* for goods sold and delivered, and in 50*l.* for money found to be due upon an account *before then* stated between them:—*Held*, on special demurrer, that the count on the account stated was sufficient. *Leaf*
v. Lees, 579

(See also post, II. 2).

II. *Plea in bar.*

(1). *Puis darrein Continuance.*

On the 14th of January, the 13th having been Sunday, the defendant, pleaded puis darrein continuance, a judgment recovered on the 5th of January:—*Seemle*, that the plea was delivered in time, rule viii. of H. T. 2 Will. 4, having operated, under those circumstances, to extend the eight days to nine, on account of the 13th falling on a Sunday. *Dudden v. Triquet*, 676

(2). *Failure of Consideration.*

By agreement, not under seal, between the plaintiff and A., B., and C., of the one part, and the defendants of the other part, reciting that the plaintiff had obtained a patent for an improvement in furnaces, and was solely interested in another patent invention; that the plaintiff and A. had obtained a patent for another invention, the plaintiff and B. for another, and the plaintiff and C. for another; it was agreed between the said parties, that, for the considerations therein mentioned, it should be lawful for the defendants exclusively to use, manufacture, and sell any or all of the said patent inventions, within certain limits, during the continuance of the several patents, on certain terms, viz. that an office and warehouse should be prepared for the

sale of articles connected with the inventions, and that books of account of the sale of each of the inventions should be kept there by the defendants, and be open at all times to the inspection of the parties thereto of the first part; that the defendants should pay to the plaintiff 400*l.* a-year as a consideration for the license for the sale, &c., of all the aforesaid patent, and that such sum should be charged as a payment by the defendants in their books of account; that they should pay A. a certain rateable sum on all machines used, &c., on his patent principle; that they should also pay the plaintiff a moiety of the net profit to arise from all the said inventions (except those in which B. and C. were interested); to the plaintiff and B. two-thirds of the net profit to arise from theirs; and to the plaintiff and C. two-thirds of the net profit to arise from theirs: and it was agreed that either of the parties might determine the agreement at the end of five, seven, or ten years. In an action on this agreement, by the plaintiff alone, to recover a half-yearly payment of the 400*l.*, the defendants set out the plaintiff's patent for the improvement in furnaces, and pleaded that it was not at the time of the grant a new invention as to the public use thereof in England, whereby the grant was void, which the plaintiff, at the time of the making of the agreement, well knew:—*Held*, on demurrer, that the plea was a bar to the action.

Held, also, that the declaration was bad on the ground of variance, as it stated the agreement to be made between the plaintiff and defendants, whereas there were other parties to it of the first part besides the plaintiff.

Seemle, that the action ought to have been jointly brought by all the parties to the agreement of the first part. *Chanter v. Leese*, 295

(3). *Accord and Satisfaction.*

The lapse of twenty years from the

time of making a contract to be performed in futuro, is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract. *Kirkman v. Siboni*, 339

(4). *Payment.*

In debt for work and labour, &c., the aggregate of the sums stated in the declaration being 30*l.*, the defendant pleaded payment of divers sums of money, amounting in the whole to the amount of all the debts and monies in the declaration mentioned. The defendant proved payments to the amount of 92*l.*, but the plaintiff proved work done, &c., to the amount of 107*l.*:—*Held*, that the plaintiff was entitled to a verdict for the balance, and was not bound to new assign. *Freeman v. Crafts*, 4

(5). *Set-off.*

Declaration in indebitus assumpsit, of four counts, the sum laid in each count being 100*l.* Plea, as to 27*l.*, parcel of the monies in the declaration mentioned, a set-off to that amount on a bill of exchange:—*Held* good on demurrer, though not pleaded to any particular count or sum. *Noel v. Davis*, 136

(6). *Other Cases.*

1. The plaintiff declared in assumpsit for commission and wages due to him on a contract, whereby he agreed with the defendants to sail for them to Bonny River, and purchase for them 1200 tons of palm oil, and ship it on board of their ships; that he would faithfully abide by their instructions to him, and would not aid or assist, directly or indirectly, the trading of any other ships or cargoes, by giving advice for the purpose of selling or bartering the same for palm oil, except so far as it might be rendered necessary for carrying the agreement into effect, and for the defendants' benefit, under the penalty of the forfeiture of

his commission and wages. The defendants pleaded, that they were merchants in Liverpool, trading to the coast of Africa, and having trading establishments there; that they were desirous of sending out an agent there, to purchase and ship for them palm oil, and to conduct exclusively their trading and take charge of their property there, which the plaintiff and one J. H. and one J. A. well knew; and that the plaintiff and those persons, contriving to defraud the defendants, fraudulently conspired and agreed together that J. H. and J. A. should fit out two ships for the coast of Africa, and that the plaintiff should apply for and obtain the employment as agent for the defendants, and under colour and by means of such employment, and without the defendants' knowledge, and in fraud of his agreement with them, should assist and advise the said J. H. and J. A. in the trading of their ships, and the selling and bartering the cargoes for palm oil, and should assist the said ships by employing the workmen and servants of the defendants upon them, and endeavour to establish a trade for the said J. H. and J. A., in competition with and to the prejudice of the defendants; that, in pursuance of such conspiracy, they fitted out ships, and the plaintiff obtained the employment as agent, and induced the defendants to enter into the agreement in the declaration mentioned, for the purposes before stated; and that he did, under colour of his employment, and without the defendants' knowledge, and in fraud of his agreement, aid and assist J. H. and J. A. in the trading of their ships, and supplied them with palm oil, by employing the defendants' workmen and servants upon them, and in other ways assisted them in the bartering their cargoes for palm oil, and in establishing a rival trade to the defendants'. Replication, de injuriâ:—*Held*, that the plea was bad; for that the mere conspiracy to

enter into the agreement, for the purposes therein stated, could not vitiate the agreement itself when carried into effect; and the actual aiding and assisting of J. H. and J. A., which was charged against the plaintiff, was not such as was specified in the agreement.

Semble, that if the plea had been good, as shewing such acts of aiding and assisting as were in breach of the agreement, the replication *de injuriâ* was good also. *Hemingway v. Hamilton*, 115

2. Declaration in case stated that the defendants were tenants to the plaintiff of a farm, and by reason thereof it was their duty, as such tenants, to manage and cultivate the farm in a good and husbandlike manner, according to the custom of the country; and assigned breaches in over-cropping, &c. Pleas, 1st, not guilty; 2ndly, that the defendants were not, nor was either of them, tenants to the plaintiff of the said messuage, &c., in manner and form as in the declaration alleged:—*Held*, that this latter plea only put in issue the fact of the tenancy, and not the holding subject to a duty to cultivate according to the custom of the country; and that the defendant could not therefore object, on this record, that a lease, under which the land had been originally taken, was not produced by the plaintiff, in order to shew that it did not exclude the custom. *Halifax v. Chambers*, 662

III. Replication.

(1). *De injuriâ*.

To a declaration on bills of exchange for 520*l.*, drawn by M. upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded, that before the accepting of the bills he was indebted to M. in a larger amount, and that they were accepted on account of 520*l.*,

part of the debt; that after the acceptance, and before the bills became due, the defendant was also indebted to other persons named, and was embarrassed in his circumstances, and unable to pay his debts in full; and thereupon, by an instrument in writing made between M. and the said other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7*s.* in the pound on their respective debts, payable on a day named (which was after the bills became due). The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that afterwards, and before the commencement of this suit, M. paid to the plaintiffs, and they received from him, divers sums of money, amounting to a sum sufficient to satisfy all consideration whatever for or in respect of the indorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs in respect of the bills or otherwise, and all claims and demands of the plaintiffs in respect of the bills or otherwise on M., in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them or otherwise; and that the plaintiffs then became, and thenceforth continued, holders of the bills without consideration, and in fraud of the defendant and his creditors. Replication, *de injuriâ*:—*Held*, on demurrer, that the replication was bad; for that the plea amounted to matter of *discharge*, not of *excuse*. *Jones v. Senior*, 123

(See also ante, II. (6), 1.)

(2). *Other Cases*.

Declaration in assumpsit by the assignee of W., an insolvent debtor, surviving partner of A., for money received by the defendant to the use of W. and

A., on an account stated with W. and A., with a breach in non-payment to W. and A., or to W. since A.'s death. Plea, as to 451*l.*, parcel, &c., that after making the promises as to that sum, and in the lifetime of A., W. and A. were indebted to the defendant in 490*l.*, for money lent, &c.; and afterwards, to wit, on &c., an account was stated between W. and A. and the defendant concerning such moneys, and the defendant then set off and allowed to W. and A. thereout the said sum of 451*l.*, parcel, &c., and exonerated and discharged W. and A. therefrom, in full satisfaction and discharge of the promises in the declaration mentioned, and of all damages sustained in respect thereof, which set-off and allowance W. and A. accepted and received from the defendant in full satisfaction and discharge as aforesaid. Replication, that W. and A. *were not indebted* to the defendant in manner and form, &c.:—*Held*, on special demurrer, that the replication was good, and that it was not necessary also to traverse in terms the accounting alleged in the plea. *Learmonth v. Grandine*, 658

IV. Demurrer.

(1). Consequences when too large.

Where, on a special demurrer to a plea, the defendant objects that the declaration is bad, if it appears that there is any matter in the declaration which is good on general demurrer, and is sufficient to sustain the action, the plaintiff is entitled to judgment; since the case must be considered as if there were a general demurrer to the whole declaration, which would, in such case, be too large. *Boydell v. Jones*, 446

PRACTICE.

I. Changing Venue.

Although the general rule is that a motion to change the venue on special grounds cannot be made until after

issue joined, yet if the pleadings and facts of the case are such that the Court cannot fail to see what the issues joined must be, the application may be granted before issue joined. *Dowler v. Collis*, 531

II. Order for Particulars.

Where an order for particulars was obtained and served, and the defendant afterwards, and before any particulars were delivered, served a demand of declaration, at the bottom of which was a notice that he had abandoned his order for particulars:—*Held*, that this was irregular, and that he ought to have got rid of the order for particulars before the demand of declaration; and the Court set aside a judgment of non pros. which had been signed for want of a declaration. *Wickens v. Cox*, 67

III. Countermand of Notice of Trial.

Notice of trial was given for the sittings after Easter Term; the sittings began on the 12th May, but that was only an adjournment day to the 16th: on the 14th the plaintiff gave notice of countermand:—*Held*, too late. *Cooper v. Whitmarsh*, 73

IV. Amendment.

(1). Of Misnomer.

Where, in the writ and declaration, in an action not upon a written instrument, the defendant is described by the initials of his name, the only remedy is by summons to amend, under 3 & 4 Will. 4, c. 42, s. 11; and the Court will not set aside the proceedings for irregularity. *Rust v. Kennedy*, 586

V. Motion in Arrest of Judgment.

Before the new rule of Hilary Term, 2 Will. 4, s. 65, a motion for arrest of judgment, or for a venire de novo, must, in this Court, have been made within the four first days of the term next after the trial.

The new rule applies to trials out of

term as well as in term. All such motions, therefore, in any of the Courts, must now be made within the four first days of term which next occur after the trial. *Thomas v. Jones*, 28

VI. Judgment as in Case of Nonsuit.

1. On motion for judgment as in case of a nonsuit, an affidavit that the plaintiff had not proceeded to trial for want of funds, but expected to be in funds so as to try at any time after the 1st of July, was held a sufficient excuse to discharge the rule on a peremptory undertaking to try in Michaelmas Term. *Radford v. Smith*, 100

2. Where the plaintiff gave notice of trial, and both parties attended on the day mentioned in the notice, but, before the cause was called on, the plaintiff proposed, and the defendant's attorney agreed to, a reference, and the record was withdrawn:—*Held*, that the defendant could not afterwards have judgment as in case of a nonsuit, although, by the default of the plaintiff, the reference was delayed, and the agreement of reference was never executed. *Hansby v. Evans*, 565

3. Where the defendant has become insolvent since action brought, a rule for judgment as in case of a nonsuit will be discharged *with costs*, unless a *stet processus* be accepted. *Holland v. Henderson*, 587

4. Where in an action of assumpsit, one of two defendants suffers judgment by default, the other defendant is still entitled to judgment as in case of a nonsuit, for not proceeding to trial. *Stuart v. Rogers*, 649

VII. Using Affidavits on enlarged Rule.

Where a rule is enlarged from one term to another, and the rule states that affidavits to be used on shewing cause are to be filed by a certain day before the term; if affidavits are filed

accordingly, and the other party takes office copies of them, the latter has a right to use them, although the party filing them may not be desirous of doing so. *Price v. Hayman*, 8

PRESCRIPTION ACT.

The enjoyment of an easement, as of right, for twenty years next before the commencement of the suit, within the stat. 2 & 3 Will. 4, c. 71, means a *continuous* enjoyment as of right, for the twenty years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the twenty years.

And such unity of possession need not be specially replied under the 5th section. *Onley v. Gardiner*, 496

PRINCIPAL AND FACTOR.

T., a corn-merchant at Longford, who had been in the habit of consigning cargoes of corn to the plaintiffs, as his factors for sale at Liverpool, and obtaining from them acceptances on the faith of such consignments, on the 31st of January obtained from the masters of two canal boats, (No. 604 and No. 54), receipts signed by them for full cargoes of oats therein stated to be shipped on board the boats, deliverable to the agent of T. in Dublin, in care for and to be shipped to the plaintiffs at Liverpool. At that time boat 604 was loaded, but no oats were then actually shipped on board boat 54. On the 2nd February, T. inclosed these receipts to the plaintiffs, and drew a bill on them against the value of the cargoes, which the plaintiffs accepted on the 7th, and paid when due. On the 6th February, W., an agent of the defendant, who was T.'s factor for sale in London, arrived at Longford and pressed T. for security for previous advances. T., on that day, gave W. an

order on T.'s agent in Dublin, to deliver to W. the cargoes of boats 604 and 54, on their arrival there. Boat 604 had then sailed from Longford, but boat 54 was only partially loaded. The loading was completed on the 9th, and T. then transmitted to W. in Dublin a receipt signed by the master of the boat, (in the same form as those sent to the plaintiffs), making the cargo deliverable to W. W. received this on the 10th. On their arrival in Dublin, W. took possession of both cargoes for the defendant.

Held, that the property in the cargo of boat 604 vested in the plaintiffs, on their acceptance of the bill, and that they were entitled to maintain trover for it; but that they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to the plaintiffs, when the receipt for that boat was given by the master. *Bryans v. Nix*, 775

Quære, whether a document, similar in form to a bill of lading, but given by the master of a boat navigating an inland canal, has the effect of such an instrument in transferring the property in the goods. *Ibid.*

PRINCIPAL AND SURETY.

(1). *Discharge of Surety by Release of Principal.*

1. A indorsed to S. & Co., as a security for advances made to him by them, certain promissory notes made by B. While the notes were running, A. stopped payment, and a deed was executed by him and several of his creditors, and among them by S. & Co., whereby his affairs were placed in the hands of inspectors, and the creditors, parties to the deed, agreed on certain terms not to call for or compel payment of the debts due from him for the period of three years. After the execution of this deed by A. and S. & Co., and before the notes became due,

B. signed a written consent to the creditors' signing the deed, and giving time to A., without prejudice to their claims on her, B.:—*Held*, that her liability on the notes to S. & Co. was thereby revived. *Smith v. Winter*, 454

2. Assumpsit on a written guarantee given to the plaintiffs for goods to be supplied by them to one G. to the extent of 400*l.* The guarantee provided that the plaintiffs were to have full liberty to extend the period of credit to G., and to hold over or renew bills, notes, or other securities given by him, "and to grant to G. and the persons liable upon such bills, notes, or securities, any indulgence, and to compound with him or them respectively, as the plaintiffs might think fit, without the same discharging or in any manner affecting the liability of the defendant by virtue of the guarantee." The declaration then averred the supply of goods exceeding the guarantee, of which sum 168*l.* was unpaid by G., of which the defendant had notice, and was requested to pay that sum, but had not done so.

Plea, that after the debt was incurred by G., and before action brought, the plaintiffs became parties to a composition deed between G. and his creditors, whereby he assigned all his stock in trade, &c., for the benefit of his creditors; and that, in consideration thereof, the plaintiffs and the other creditors, parties thereto, granted a general release to G. of all debts and demands against him. The plea then averred, that the promise in the declaration was only made by the defendant as surety, and that the plaintiffs, by the deed, released G. without the privity of the defendant, and without notice.

Held, on demurrer, that under the express terms of the guarantee, the security was not discharged by the release of the principal debtor. *Cowper v. Smith*, 519

PROBATE DUTY.

Probate duty is payable in respect of bonds of foreign governments, of which a testator, dying in this country, was the holder at the time of his death, and which have come to the hands of his executor in this country; such bonds being marketable securities within this kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of this kingdom in order to render the transfer of them valid. *Attorney-General v. Bouwens*, 171

PROCESS.

I. Writ of Summons.

(1). Description of Form of Action.

A writ of summons stated the action to be "action on the case promises:"—*Held* insufficient, and the Court set it aside for irregularity. *Youlton v. Hall*, 582

(2). Indorsement on.

In the indorsement of the residence of an attorney on a writ of summons, it is not necessary to state the county, unless otherwise it would be calculated to mislead. *Id.* 583

II. Capias.

(1). What sufficient Copy.

Where a writ of capias described the defendant by the addition of "gentleman," but that addition was omitted in the copy served:—*Held*, that this was not a copy of the writ, in compliance with the stat. 2 Will. 4, c. 39, s. 4. *Cooke v. Vaughan*, 69

III. Venditioni exponas.

(1). Returnable in Vacation.

The writ of venditioni exponas is a branch of the writ of fieri facias, not a distinct process; and therefore a judge has power in vacation, under 2 Will. 4, c. 39, s. 15, to order the sheriff to return such writ, and an attachment may

RAILWAY ACT.

be obtained for disobedience to such order, pursuant to the rule of M. T. 3 Will. 4, s. 13. *Hughes v. Rees*, 468

RAILWAY ACT.

By the statute 3 Will. 4, c. 34, (local and personal, public), the Grand Junction Railway Company are empowered to make a railway from Warrington to Birmingham; and by section 154 they are empowered to receive certain tonnage rates "for all articles, matters, or things carried or conveyed on the railway;" by section 156 the Company are empowered to become carriers themselves, and are authorized, if they shall think proper to use engines, &c., "to carry and convey upon the railway all such passengers, cattle, goods, wares, and merchandises, articles, matters, and things as shall be offered to them for that purpose, upon certain reasonable charges;" by the 214th section, "no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under the act, unless fourteen days' previous notice in writing shall be given by the parties intending to commence or prosecute such action, &c., nor unless such action, &c., shall be brought within three months;" and by the 215th section, power to tender amends is given. Under the 156th section, the Company became carriers themselves. In an action against them for not safely carrying and conveying some horses in their carriages on the railway, whereby one was killed and others were injured:—*Held*, that the Company were not entitled to notice of action, as for a thing done or omitted to be done in pursuance of the act; and that, not having had restricted their liability by any special contract, they

SEAMAN'S WAGES.

were subject to the liabilities of carriers at common law.

At the trial, there was contradictory evidence as to whether a ticket, by which the Company sought to limit their liability, had been delivered to the son of the plaintiff, and the learned Judge left it to the jury to say whether it was delivered to him or not :—*Held*, that it was no misdirection in his not telling them to find whether it was not read over and explained to him. *Palmer v. The Grand Junction Railway Company*, 749

REWARD.

For Discovery of Thief, Action for.

A party who had been robbed of bank notes put forth a hand-bill, wherein it was stated, that "whosoever would give information whereby the same might be traced, should, on conviction of the parties, receive a reward of 20*l.*":—*Held*, that the only persons entitled to the reward was he who *first* gave information by which the notes were traced to the robbers, so as to ensure their conviction: and that it was not necessary that such information should be communicated to the party robbed, if it was given to a person authorized to receive it, and to act upon it in the apprehension of the offenders; as to a constable. *Lancaster v. Walsh*, 16

SEAMAN'S WAGES.

Where a seaman who has signed the articles of agreement required by 5 & 6 Will. 4, c. 19, absolutely quits the ship, without any animus revertendi, after her arrival and being moored at her port of delivery, but before her cargo has been discharged, he does not thereby incur a total forfeiture of his wages within the 9th section of that statute, but only of a month's wages under the 7th section. *M'Donald v. Jopling*, 285

STAMP.

829

SET-OFF.

See BANKRUPTCY.
PLEADING, II. 5.

SHERIFF.

See ARREST, 3.
BAIL, 2.
ESCAPE.

Fees of.

The sheriff's right to *poundage* is not affected by the stat. 1 Vict. c. 55, or the table of fees made under it. *Davies v. Griffiths*, 377

STAMP.

See LIMITATIONS, STAT. OF, 2.

(1). *Admissibility of unstamped Instrument.*

A petition having been presented to the House of Commons against the return of a member, on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition:—*Held*, that this agreement was illegal.—*Held*, also, that the written agreement was admissible in evidence, for the purpose of insisting on the illegality of the transaction, in answer to an action for the sum so agreed to be paid, without its being stamped. *Coppock v. Bower*, 361

(2). *Several Stamps.*

By a written agreement, three persons bound themselves that in consideration of A.'s discharging a debt due from B. to C., amounting to 200*l.* with the costs thereupon, each of the three *would severally pay 50*l.**, and one fourth part of such costs, and give a bond, bill, or note for his own proportion:—*Held*, that the agreement required only one stamp. *Ramsbottom v. Davis*, 584

VARIANCE.

SUBPCENA.

See WITNESS, 2.

SUNDAY.

See LIEN.

TITHES.

(Notice to determine Composition).

The same notice is requisite to determine a yearly composition for tithes, as in the case of a tenancy of lands, namely, six months' notice, ending at the expiration of the year of composition.

Where a party held tithes under a yearly composition, commencing at Michaelmas, some of the tithes being payable in May, and on the 24th March he gave the tithe-owner notice that he intended "from henceforth" to set out the tithes in kind:—*Held*, that this notice could not enure to determine the composition from the Michaelmas following, but that it was altogether inoperative. *Goode v. Howells*, 198

TRESPASS.

(1). Pleadings.

A plea, to trespass for assault and battery, that the defendant was in possession of a *dwelling-house*, and that the plaintiff disturbed him in his possession, wherefore he turned him out, is not sustained by proof that the defendant was a lodger, occupying one room in a house, the landlord keeping the key of the outer door. *Monks v. Dykes*, 567

TROVER.

See VENDOR AND PURCHASER, 1.

VARIANCE.

See PLEADING, II., 2.

VENDOR AND PURCHASER.

VENDOR AND PURCHASER.

(1). Appropriation to Purchaser.

B., a builder, contracted with A. and others, trustees of a new hotel about to be erected by a company of proprietors, to build the hotel, except as to the ironmonger's, plumber's, and glazier's work, for a specified sum, and covenanted to complete certain portions of the work within certain specified periods, being paid by instalments at corresponding dates; and that if he should neglect to complete any portion within the time limited, he should forfeit and pay the sum of 250*l.* as liquidated damages. The agreement then contained a clause empowering the trustees, in case (*inter alia*) B. should become bankrupt, to take possession of the *work already done* by him, and to put an end to the agreement, which should be altogether null and void; and that the trustees, in such case, should pay B. or his assignees only so much money as the architect of the Company should adjudge to be the value of the *work actually done and fixed* by B., as compared with the whole work to be done. The course of business during the progress of the work was for the clerk of the works to inspect every article which came in under the contract, and none were received except on his approval. After the works had proceeded some time, B. became bankrupt. Before his bankruptcy, certain wooden sash-frames had been delivered by him on the premises of the Company, approved by the clerk of the works, and returned to B. for the purpose of having iron pulleys, belonging to the trustees, affixed to them; and at the time of the bankruptcy, these frames, with the pulleys attached to them, were at B.'s shop. He afterwards, but before the issuing of the fiat, re-delivered them to the trustees; and the sash-frames being afterwards demanded of them by B.'s assignees,

they gave an unqualified refusal to deliver them up.

Held, 1st, that the property in the wooden sash-frames had not passed to the trustees at the time of the bankruptcy.

2ndly, That they were not entitled to retain them under the agreement, as being *work already done*, they not having been *fixed* to the hotel; but that even if they were within that clause of the agreement, it could not bind the assignees, inasmuch as their right accrued on the bankruptcy, whereas the option of the trustees was not to be exercised until after the bankruptcy.

3rdly, That the refusal of the trustees not having been limited to the *pulleys*, the demand and refusal were sufficient evidence of a conversion by them of the wooden sash-frames, so as to entitle B.'s assignees to recover them in trover. *Tripp v. Armitage*, 687

II. Of Real Estate.

(1). Recovery of Deposit Money.

In an action for money had and received to recover back the deposit money paid by the plaintiff on the purchase of an estate, a special case stated, that by the will of the defendant's father, the estate in question was devised to him after the death of his mother, and to his issue in tail, subject to a payment of 2*l.* a year to his sister M. C., with remainder to the testator's own right heirs. In the year 1817, and during the lifetime of his mother, the defendant, by lease and release, assigned the estate for his own life to his sister M. C., and R. W., upon trust to receive the rents and apply them to keep the tenements in repair, to pay to M. C. her annuity of 2*l.*, and to pay the residue to the defendant. After the mother's death, M. C. (R. W. being dead) received one quarter's rent, since which the rents had been received by the defendant. In February, 1836, the defendant advertised the estate for

sale, and on the 25th of that month the plaintiff purchased it upon a contract stated in the conditions of sale.—Amongst other conditions were the following:—"That the premises are to be sold subject to a yearly rent of 2*l.*, payable during the life of M. C., the sister of the defendant, and which said M. C. having given notice that in consequence of a certain alleged indenture, bearing date August 19, 1817, whereby she alleges the defendant conveyed all his estate and interest in the premises unto R. W., (now deceased), and the said M. C. for the term of his the said defendant's life, upon certain trusts in the alleged indenture contained, and that no conveyance of the premises could be made without the concurrence of her the said M. C., and who thereby declared she should refuse to execute any such conveyance, the said defendant declared *that the said alleged indenture is a fabrication, and has made a solemn affidavit that he never executed any such indenture, and that such indenture, as far as concerns any supposed signature or mark of him, the defendant, is a forgery*; and the opinion of Sir J. C., his Majesty's Attorney-General, and Mr. K., have been taken as to the necessity of the said M. C.'s concurring in the sale, and were in favor of the defendant's being able, by virtue of the recent act for abolishing fines and recoveries, to make a good title to the premises without the sanction and concurrence of the said M. C.; and the vendor is also prepared to prove that on the trial of an action of replevin of S. v. the said M. C., the presiding Judge expressed himself favorably to the right of the defendant to convey without the concurrence of the said M. C.; *the purchaser therefore shall not make any objection on account of the said alleged indenture, nor be entitled to call for any sanction, concurrence, &c. &c., by or from the said M. C.; but if the purchaser shall think fit, in*

832 VENIRE DE NOVO.

order to indemnify him or her against all action, suits, and other proceedings, claims and demands by the said M. C., a portion of the purchase-money (not exceeding 200*l.*) *may remain as a charge by way of mortgage on the premises, at interest after the rent of 4½ per cent., and that such charge, at the option of the purchaser, shall remain on such security during the life of the said M. C., and for a period not exceeding twelve months after her decease.*" The plaintiff paid the deposit now sought to be recovered. The jury, at the trial, found a verdict for the plaintiff for the amount of the deposit, and that the deed of the 19th August, 1817, was the deed of the defendant:—*Held*, 1st, that whether the representation of the deed being a forgery were a warranty upon which the plaintiff might maintain an action or not, the plaintiff had no right to rescind the contract because it turned out to have been untrue. 2ndly, that by the stipulation "that the purchaser should not make any objection on account of the alleged indenture," *every species of objection* to the title on the part of the purchaser arising out of the alleged deed was interdicted, and he was precluded from insisting either upon the existence of the deed, or upon its legal effect and operation, as a defect in the title which he had agreed to take. *Corrall v. Cattell*, 734

VENIRE DE NOVO.

See **BILLS AND NOTES, I.**

Where there is a misjoinder of counts, and the jury find general damages, a venire de novo cannot be awarded, but the judgment must be arrested.

An application for a venire de novo, made by the plaintiff on a subsequent day in the same term after a rule for arresting the judgment had been made absolute, was held in time. *Corner v. Shew*, 163

WAY.

VENUE.

See **PRACTICE, 1.**

WARRANTY.

See **EVIDENCE, 1.**

FRAUDS, STATUTE OF, 1.

By Manufacturer and Seller of Goods.

The defendant sent to the plaintiff, the patentee of an invention known as "Chanter's smoke-consuming furnace," the following written order:—"Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right 15*l.* 15*s.*; ironwork not to exceed 5*l.* 5*s.*; engineer's time fixing, 7*s.* 6*d.* per day." The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of a brewery, and was returned to the plaintiff:—*Held*, (no fraud being imputed to the plaintiff), that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of a brewery; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the whole 15*l.* 15*s.*, the price of the patent right. *Chanter v. Hopkins*, 399

WAY.

1. Trespass qu. cl. fr. Plea, under 2 & 3 Will. 4, c. 71, a right of way for the occupiers of a close, for twenty years, for horses, carts, waggons, and carriages, at their free will and pleasure. Replication, traversing such right:—*Held*, first, that under this issue the plaintiff might shew that the defendant had a right of way for horses, carts, waggons, and carriages for certain purposes only, and not for all, and was not compelled to new assign; and might shew that the purpose for which

the defendant had used the road, and in respect of which the action was brought, was not one of those to which his right extended.

Secondly, that evidence of user of a road with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but that the extent of the right is a question for the jury, under all the circumstances of the case. *Cowling v. Higginson*, 245

2. To a declaration in trespass, the defendant pleaded that he and the former occupiers of a house and land had for twenty years used and enjoyed as of right, a certain way on foot and with horses, &c., from and out of a common highway towards, into, through, and over the plaintiff's close to the defendant's house and lands, and back, at all times of the year, at their free will and pleasure. The replication averred that the defendant, &c., used and enjoyed the right of way mentioned in the plea, but that they did so under the plaintiff's leave and license. At the trial, it appeared that the defendant and the former occupiers of his house and land had an admitted right of way from thence over the locus in quo to the highway, and across the highway, to a close called Ruddocks, and that for the last twenty years they had a license from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands over the locus in quo to the highway and back, when they had not any intention of going to Ruddocks:—*Held*, that the replication was not supported by this evidence, and that the plaintiff was bound to shew a license co-extensive with a right claimed in the plea, and admitted by the replication. *Colchester v. Roberts*, 769

WITNESS.

(1). *Incompetency from Interest.*

The proper time to object to the incompetency of a witness on the

ground of interest is on his being called, on the voir dire, and evidence cannot afterwards be adduced to shew his incompetency. *Dewdney v. Palmer*, 664

(2). *Liability for Disobedience to Subpœna.*

Declaration in case against a witness, for disobedience to a subpœna, alleged that a certain issue came on to be tried before the Justices of Assize, at Taunton, on the 31st March, 1838; that the plaintiff before then sued out a writ of subpœna duces tecum, directed to the defendant, commanding him to appear before the Justices of Assize, at Taunton, on Saturday, the 31st of March then instant, *and so from day to day until that cause should be tried*, and produce, at the time and place aforesaid, certain documents therein specified; which writ the plaintiff, before the trial of the said issue, to wit, on the 2nd of April, 1838, served on the defendant; and that, although the appearance of the defendant *was necessary and material on the said trial of the said issue*, and although the defendant *could and might have appeared at the trial of the said issue*, and produced the documents, and although they were material evidence for the plaintiff, yet the defendant did not appear, &c.; by reason whereof the plaintiff was forced to become nonsuited:—*Held*, on general demurrer, 1st, that it sufficiently appeared that the trial had at the Assizes was the same as that mentioned in the subpœna; and, 2ndly, that it was sufficiently shewn that the plaintiff had a good cause of action in the original suit.

Held, also, that as the subpœna required the defendant's attendance on the first day of the Assizes, (the 31st of March), and so from day to day until the cause should be tried, an action might be maintained for disobedience to it, although it was not served until the 2nd of April, the cause not

having been then tried, and the defendant being so informed at the time of service, and having then a reasonable time for attending the trial. *Davis v. Lovell*, 678

WRIT OF ERROR.

Allowance of Interest on.

Where judgment is given in a court of error for the defendant in error, the Court is *bound*, under 3 & 4 Will. 4, c. 42, s. 30, to allow interest for the time that execution has been delayed by the writ of error. Such interest will be calculated at 4 per cent. *Levy v. Langridge*, 337

WRIT OF TRIAL.

(1). *Practice on.*

1. Where, on the trial of a cause un-

der a writ of trial, a bill of exceptions had been tendered to the under-sheriff, which he declined to receive, the Court refused to interfere to stay judgment and execution. *White v. Hislop*, 73

(2). *What Actions triable by.*

2. The first count of the declaration was on the warranty of a horse sold by the defendant to the plaintiff for 7*l.* 2*s.* 6*d.*, and for the expense of its keep. There were also counts for money had and received, and on an account stated; and the damages were laid at 20*l.* At the trial, the plaintiff recovered the 7*l.* 2*s.* 6*d.*, the price of the horse:—*Held*, that the action was triable before the sheriff under a writ of trial. *Allen v. Pink*, 140

END OF THE FOURTH VOLUME.

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